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IN THE

Supreme Court of the United States

October Term, 1982

FRANCIS OIL & GAS, INC., CURTIS S. GREEN, DAVE R. SYLVAN, GEORGE D. DALY, GEORGE B. KAISER and DON H. NELSON, individually and on behalf of all other persons similarily situated, collectively and as a class,

Petitioners,

v.

EXXON CORPORATION and MARATHON OIL COMPANY, individually and on behalf of all other persons similarily situated, collectively and as a class,

Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE TEMPORARY EMERGENCY COURT OF APPEALS OF THE UNITED STATES

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September 15, 1982

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QUESTIONS PRESENTED

1) Whether the Temporary Emergency Court of Appeals ("TECA") has jurisdiction to review a declaratory judgment of a district court which, applying state law, interprets the private rights of parties under a contract where the federal energy regulations expressly provide that the issue is one of private contract governed by state law?

2) Whether TECA has correctly construed, in disregard of the District Court's explicit finding that state law would require the contrary result, federal regulations (stated by the specialized administrative agency to be neutral as regards the distribution of imputed stripper oil) to require an affirmative contractual provision in order for preunitized stripper well property owners to receive a greater than *pro rata* share of the Unit's imputed stripper well production?[1]

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[1]Although no longer a stated consideration under Rule 17 for granting certiorari, TECA's complete disregard of the District Court's expert construction of state law is one indication of TECA's unjudicial treatment of the litigation. Another indication is TECA's misreading of the District Court's judgment. TECA relied on the fiction that the petitioners admitted the Unit production formula controlled the allocation of lower and upper tier oil (App. A-14). This is untrue. Petitioners never admitted the correctness of the allocation of upper and lower tier oil. Petitioners were, rather, unable to contest the allocation; they did not have the necessary information (historical BPCL and production histories of all the tracts which form the Unit) that would have been required to attempt an allocation of prices different from that actually employed by named petitioners. Only Marathon, the unit operator, had the information necessary to allocate prices for lower tier and upper tier oil. The existence of imputer stripper oil, on the other hand, is solely a function of the individual properties which were aggregated to form the Unit. Hence, the named petitioners were able to determine, without reference to the rest of the Unit, the amount of imputed stripper oil attributable to their Tract 117. Furthermore, as petitioners established in the court below, the allocation of lower and upper tier oil involves numerous special considerations not applicable to the present stripper oil controversy.

PARTIES

The parties to the proceedings in this action are the working interest and royalty interest owners in the Yates Field Unit, located in Pecos and Crockett counties, Texas. Francis Oil & Gas, Inc., Curtis S. Green, Dave R. Sylvan, George D. Daly, George B. Kaiser and Don H. Nelson were designated representatives of the plaintiff class, defined by the District Court below (and as requested by the respondents) to be:

> "All persons who own an interest in the Yates Field Unit who would derive an economic benefit in their capacity as Unit participants from the allocation of Unit production to their respective tracts on the basis advocated or utilized by the interest owners in Tract 117."

Exxon Corporation and Marathon Oil Company were designated representatives of the defendant class, defined by the District Court below (and as requested by the respondents) to be:

> "All persons who own an interest in the Yates Field Unit who would not derive an economic benefit in their capacity as Unit participants from the allocation of Unit production to their respective tracts on the basis advocated or utilized by the interest owners in Tract 117."

The unnamed members of the classes known to the named parties were identified in papers filed pursuant to Rule 21(c) of the Rules of the Temporary Emergency Court of Appeals. The petitioners stand ready to provide such documentation to the Court should the Court deem it advisable.

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FRANCIS OIL & GAS, INC., CURTIS S. GREEN, DAVE R. SYLVAN, GEORGE D. DALY, GEORGE B. KAISER and DON H. NELSON, individually and on behalf of all other persons similarily situated, collectively and as a class,

Petitioners,

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EXXON CORPORATION and MARATHON OIL COMPANY, individually and on behalf of all other persons similarily situated, collectively and as a class,

Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE TEMPORARY EMERGENCY COURT OF APPEALS OF THE UNITED STATES

Petitioners pray that a writ of certiorari issue to review the judgment of the Temporary Emergency Court of Appeals of the United States entered on August 16, 1982 in this case.

OPINIONS BELOW

The opinion of the Temporary Emergency Court of Appeals will be reported at ____ F.2d ____ (TECA 1982), and is reproduced as Appendix A-1 to A-15. The Judgment of the Temporary Emergency Court of Appeals is reproduced as Appendix B, at p. A-16. The Amended Summary Judgment entered by the District Court is not officially reported and is reproduced as Appendix C, pp. A-17 to A-26.

JURISDICTION

The judgment of the Temporary Emergency Court of Appeals was entered on August 16, 1982. No petition for rehearing has been filed. The jurisdiction of this Court is invoked pursuant to 12 U.S.C. App. 1904, §211(g) and 15 U.S.C. §754(a) (1).

STATUTORY AND REGULATORY PROVISIONS

12 U.S.C. App. 1904, §211(b) (2):

> "Except as otherwise provided in this section, the Temporary Emergency Court of Appeals shall have exclusive jurisdiction of all appeals from the district courts of the United States in cases and controversies arising under this title or under regulations or orders issued thereunder. Such appeals shall be taken by the filing of notice of appeal with the Temporary Emergency Court of Appeals within thirty days of the entry of a judgment by the district court.

10 C.F.R. §212.75(b)(2) (repealed, 46 Fed. Reg. 20508 [April 3, 1981]) states, in pertinent part[2]

> "imputed stripper well crude oil means, (1) with respect to a unitized property for which a unit base production control level was established prior to August 1, 1977, in a particular month, a number of barrels of crude oil equal to the total number of barrels of crude oil (excluding condensate recovered in non-associated production) produced during the 12-month period immediately preceding the establishment of a unit base production control level for the unitized

[2]Most of the crude oil regulations were revoked by President Reagan's decontrol of crude oil and refined petroleum products on January 30, 1981. Executive Order 12287, 46 Fed. Reg. 9909. The Department of Energy then formally repealed the regulations on April 3, 1981. 46 Fed. Reg. 20508. The stripper well categorization retains continuing national significance due to the favored tax treatment of stripper well oil in relation to most other oil categories under the Crude Oil Windfall Profits Tax of 1980, 26 U.S.C. §4987, 4991.

property from all stripper well properties (qualified as such as of the establishment of a unit base production control level for the unitized property) that constitute the unitized property, divided by the number of days in that 12-month period, and multiplied by the number of days in that particular month."

41 Fed. Reg. 4931, 4937 (February 3, 1976):

"Although some comments suggested that FEA prescribe the method for allocating this quantity of upper tier crude oil among the participating leases, FEA has determined that this allocation is more properly a matter for private resolution among participants of the unit agreement."

STATEMENT

A. STATEMENT OF THE CASE

This current action was originally filed in Texas state court as a bilateral class action.[3] The named respondents removed the action to the United States Distict Court for the Western District of Texas on the basis of diversity of citizenship and federal question jurisdiction, whereupon the District Court certified this action as a bilateral class action.[4]

On February 19, 1981, the named petitioners filed their Motion for Summary Judgment. Extensive discovery was conducted and completed. Exxon and Marathon filed a cross motion for summary judgment on or around

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[3]Professor Moore has coined the phrase "bilateral class action" to define a class action with both plaintiff and defendant classes. 3B *Moore's Federal Practice*, ¶ 23.40[6] at p. 23-311.

[4]Significantly, the district court only ruled that it had jurisdiction based on diversity of citizenship grounds. Amended summary judgment, App. C., undisputed fact No. 12 at A-25.

September 24, 1981. After receiving extensive briefs on the issues presented to this Court, and after hearing oral argument on the parties' motions for summary judgment, the District Court granted the named petitioners' Motion for Summary Judgment.[5]

The District Court squarely based its decision on state contract law. The District Court held that the Unit Agreements allocate only production, and not the prices or proceeds of sale.[6] The District Court also held that, as a matter of state contract law, the stripper well pricing benefits after unitization belong to the individual tracts giving rise to the benefits and are not allocated to other tracts unless there is a specific contract provision allocating the pricing benefits in some other manner. Simply stated, the District Court held that the pricing attributes of crude oil are not "unitized substances" within the meaning of the Unit Agreements. Because, under Texas state law, the Unit Agreements allocate only production, and not the prices or proceeds of sales, the District Court held that the intent of the parties under the Unit Agreements was to leave the benefit of stripper well pricing with the plaintiff class, your petitioners.

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[5]By requesting summary judgment, the petitioners did concede that no issue of fact existed under the theory that the petitioners were advancing. On the other hand, the petitioners did not concede that no issues remain in the event that the respondents' theory would be adopted. 6 *Moore's Federal Practice*. ¶ 56.13 at 56-341 to 56-345, 10 Wright & Miller, *Federal Practice and Procedure*, §2720 at pp. 459-467. The respondents' theory relied heavily on unsupported assertions of purported and nebulous industry practice and understanding. The unsupported allegations of industry practice and understanding were denied by the petitioners in deposition testimony. TECA was therefore patently incorrect in directing that summary judgment be entered in favor of the respondents. Basic issues concerning the construction of the Yates Field unit agreements remained after TECA's disposition.

[6]The amended summary judgment on February 4, 1982 made clear that the summary judgment was entered on behalf of the plaintiff class, and not simply on behalf of the named plaintiffs. The amended order also corrected a typographical error

The respondents then perfected dual appeals to the Temporary Emergency Court of Appeals ("TECA") and to the United States Court of Appeals for the Fifth Circuit.[7]

On appeal, TECA reversed the District Court's award of summary judgment to petitioners and directed that summary judgment be entered in favor of the respondents. Over petitioners' objections, TECA upheld its jurisdiction to review the District Court's judgment and held that the act of unitization deprived the prior tract owners of any right to certify their tract's pre-unitized level of stripper oil *unless* a specific provision in the unitization document so gave them the right. TECA then stated that the under Texas law, no clause in the Yates Field Unit agreements preserved the petitioners' rights to so certify the imputed stripper oil.

B. STATEMENT OF THE FACTS

The Yates Field Unit is located in Pecos and Crockett Counties, Texas. The named petitioners are the owners of oil and gas produced from the oil and gas leases located within Tract 117 of the Yates Field Unit. Prior to unitization of the Yates Field, the named petitioners had sold their oil, through the tract operator Kaiser-Francis Oil Company, to Exxon. Forty barrels of daily oil production from Tract 117 qualified for stripper status at the time of unitization.[8]

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[7]The Fifth Circuit has stayed further proceedings in Appeal No. 82-1088 pending resolution of the TECA appeal.

[8]Stripper crude oil, at all times relevant to this controversy, was generally defined as crude oil produced from a property whose average daily production did not exceed 10 barrels per well during a designated qualifying period. 15 U.S.C. §757 (i)(2). The price of stripper oil was uncontrolled, except for a period from February to September 1976, where the price of stripper oil was controlled at the upper tier level. 10 C.F.R. §212.54, repealed 46 Fed. Reg. 20508 (April 3, 1981).

Marathon Oil Company was the primary mover behind unitization of the Yates Field Marathon, with an eventual 49.480235% interest in the Unit, was the principal drafter of the Unit Agreements. The Unit Agreements, as drafted by Marathon and executed by a small group of insiders, underwent only slight modification when later submitted for approval by the other unit participants.

Marathon submitted the Unit Agreements for comments by a letter dated December 10, 1974 to only a favored few major working interest owners in the Yates Field.

Marathon's December 10, 1974 letter enclosed copies of the Unit Agreements and invited the addressees to a meeting to be held on December 16, 1974. Marathon's December 10, 1974 letter was not sent to named petitioners.

Marathon knew at the time of the December 10, 1974 mailing that George B. Kaiser, acting as tract operator, had specifically requested (in a letter dated October 28, 1974 to Marathon) to be included on Marathon's mailing list for all future correspondence. Despite Mr. Kaiser's clear request, Mr. Kaiser was not included on the mailing list and consequently was not in attendance at the initial working interest meeting held on December 16, 1974. Nor did Mr. Kaiser receive a copy of the summary of the December 16, 1974 meeting.

Instead, Mr. Kaiser received a Marathon letter dated January 16, 1975 which presented a *fait accompli* to the named petitioners. The January 16 letter stated:

> "A method for establishing tract participation has been developed which has proved to be acceptable to a vast majority of the operators .... We believe these agreements in their present form are acceptable to an overwhelming number of operators and that we will soon be able to put them in form for execution."

The withheld summary of the December 16, 1974 meeting confirmed the *fait accompli* of the determination of the participation factor assigned the named petitioners. The economic realities of the Yates Field left the named petitioners with no choice but to ratify the Yates Field Unit Agreements.

The Yates Field Unit became fully operational on July 1, 1976 when Marathon, the unit operator, established the Unit's Base Production Control Level ("BPCL"). Commencing with the month of July, 1976 and ending with the month of September, 1980, the named petitioners have sold Exxon all the oil allocated to Tract 117.[9] The named petitioners, pursuant to regulation, certified to Exxon each month the amount of old oil, new oil and stripper oil which the named petitioners were selling.[10] In accordance with the Yates Field Unit Agreements, the name petitioners certified the Tract 117 oil qualified for stripper well pricing benefits.

Exxon totally ignored the named petitioners' certifications. Exxon's payments were determined from calculations based on certain information provided by Marathon, the unit operator. This information included the

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[9]The named petitioners did not continue selling their oil to Exxon after the stripper well pricing controversy started by choice. The named petitioners were effectively required to sell their oil to Exxon by federal regulation. See former 10 C.F.R. §211.63(a). When that regulation was amended in September 1980 to exclude purchases by "majors" from coverage, the named petitioners promptly discontinued selling their oil to Exxon and found a new purchaser willing to pay the named petitioners pursuant to the named petitioners' lawful certifications.

[10]In general, the quantity of oil produced during the twelve month period preceding the establishment of the unit constituted the unit's BPCL. Generally, all production at or below a unit's BPCL was deemed "old" oil, while quantities in excess of the unit BPCL qualified as new oil. New oil qualified for a higher price than old oil. 10 C.F.R. §212.75(b), 41 Fed. Reg. at 4941. The regulation further provided a special rule for units established before August 1, 1977 permitting continued qualification for stripper well production derived from tracts in the unit during the year preceding unitization. The sum of all such production was defined as the unit's "imputed stripper well crude oil." 10C.F.R. §212.75(b).

Unit's monthly production, BPCL, and total unit amounts of stripper oil, upper tier oil and lower tier oil. Exxon used the tract participation formula set forth in the Unit Agreement which specified participation based on the producer's tract size relative to the size of the whole unit. Exxon allocated the benefits of stripper well pricing among all unit participants in the same percentages as was otherwise provided by the tract participation formula for the allocation of crude oil production. The result of the use of the tract area formula was that the amount of stripper well oil allocated to the named petitioners was considerably smaller than the actual amount of stripper oil certified by the named petitioners to the defendant Exxon. Marathon explicitly denied making any certifications to Exxon as to Tract 117 oil.

The crude oil allocated by the Unit Agreement to Tract 117 was received in kind and separately and independently marketed by the named petitioners.

When this controversy first arose[11] Exxon sought an opinion of the Department of Energy that Marathon was

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[11]The controversy between the named petitioners and Exxon resulted in two other federal court actions and one state court action. In the first federal action, Francis Oil & Gas, Inc. ("Francis") sued Exxon for the difference in amounts paid by Exxon to Francis and the amount certified by Francis. *Francis Oil & Gas, Inc. v. Exxon Corporation,* No. 77-C-161-D, Northern District of Oklahoma. Before a ruling on the merits of the *Francis* action could be obtained, Exxon filed a Motion for Judgment on the Pleadings for Failure to Join Indispensable Parties. Exxon contended that the suit by Francis against Exxon for breach of contract really involved a construction of the provisions of the Yates Field Unit Agreement and the Yates Field Unit Operating Agreement and that, therefore, all the working interest owners in the Yates Field Unit were indispensable parties. Working interest owners representing 1.352535 percent of the total working interest ownership were Oklahoma citizens. Exxon claimed that diversity jurisdiction would not lie and that the cause would have to be dismissed. The District Court, in a written order, agreed with Exxon. The District Court was reversed by the United States Court of Appals for the Tenth Circuit *Francis Oil & Gas, Inc. v. Exxon Corporation,* 661 F.2d 873 (10th Cir.

the proper party to certify production from Tract 117. The Department of Energy rejected Exxon's request and opined that the named petitioners were the proper certifying parties. Furthermore, the Department of Energy expressly opined that the issue whether the named petitioners or the other unit participants were entitled to the stripper well pricing benefits was a question of the private contractual agreements of the parties to be decided by state law.

REASON FOR GRANTING THE WRIT

A. Conflict with decisions of other Courts of Appeal: This Court should grant certiorari because the TECA decision expanding its jurisdictional grant is in conflict with decisions from the Second Circuit and Fifth Circuit, as well as in conflict with prior TECA decisions. Supreme Court Rule 17(a). Prior to the TECA decision, the courts of appeal had been agreed on the parameters of TECA jurisdiction:

> "for purposes of determining TECA jurisdiction, what is determinative is not whether an EPAA question exists but whether an EPAA question has been adjudicated." *Texaco Inc.* v. *Department of Energy*, 616 F.2d 1193, 1198 (TECA 1979).

1981). The case is now pending before the District Court for the Northern District of Oklahoma on Francis' Motion for Summary Judgment.

The second federal suit was filed by the named petitioners other than Francis Oil & Gas, Inc. against Exxon under the same breach of contract theory. *Curtis S. Green et. al. v. Exxon Corporation*, No. 79-C-444-E, Northern District of Oklahoma. The *Green* case had been abated by the District Court, pending resolution of the *Francis* appeal by the Tenth Circuit. The *Francis* appeal having been resolved, the *Green* case is now pending on a Motion for Summary Judgment against Exxon Corporation.

A state court action was brought in Texas against Exxon by the named petitioners, as a consequence of the *Francis* dismissal. *Francis Oil & Gas, Inc. et al v. Exxon Corporation*, No. 4141, 83rd Judicial District, State of Texas. Exxon filed a Motion to Abate pending the resolution of the action now before this Court. There has been no other action taken in the Texas state action.

> "What is determinative . . ., is not the existence of an ESA issue, but whether the ESA issue has been adjudicated." *Coastal States Marketing, Inc.* v. *New England Petroleum Corp.*, 604 F.2d 179, 187 (2d Cir. 1979); *see* also, *United States* v. *Uni Oil, Inc.*, 646 F.2d 946 (5th Cir. 1981).

In the past, in determining jurisdiction, TECA looked "only to the nature of the issue on appeal and not to the nature of the underlying case or controversy." *Gulf Oil Corp.* v. *Department of Energy*, 639 F.2d 766, 767 (TECA 1981). In other words, TECA's jurisdiction was one of "issue jurisdiction"—TECA would only decide federal energy issues on appeal, and would leave the non-federal issues to the regular courts of appeal for adjudication. The second and fifth circuits explicitly adopted TECA's approach. *Coastal States Marketing, Inc.* v. *New England Petroleum Corp.*, 604 F.2d 179 (2nd Cir. 1979); *United States* v. *Uni Oil, Inc.*, 646 F.2d 946 (5th Cir. 1981). Inexplicably, TECA choose to repudiate its past precedents[12] in this case and decide issues specifically adjudicated by the District Court under state law.

As hereafter discussed, the issue decided by the District Court was an issue explicitly left by the federal regulations to be decided by private - that is state - contract law. No "EPAA" issue was therefore decided; the jurisdictional prerequisite to the TECA appeal was missing, as TECA's jurisdiction is founded exclusively on the provisions of the Economic Stabilization Act, 12 U.S.C. §1904 note

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[12] *See e.g., United States v. Zang*, 653 F.2d 493 (TECA 1981), *cert. denied* ____ U.S. ____, 102 S.Ct. 323 (no jurisdiction over appeals from convictions of conspiracy, mail fraud and racketerring despite the fact that criminal offenses arose out of violations of Emergency Petroleum Allocation Act regulations); *Spinetti v. Atlantic Richfield Co.*, 522 F.2d 1401 (TECA 1975) (no jurisdiction over counts alleging antitrust and fair trade action violations); *Atlantic Richfield Co. v. Department of Energy*, 655 F.2d 227 (TECA 1981) (no jurisdiction over state law issues); *United States v. Cooper*, 482 F.2d 1393 (TECA 1973) (no jurisdiction over convictions for fraudulent misrepresentations); *Texaco Inc. v. Department of Energy*, 616 F.2d 1193 (TECA 1979) (no jurisdiction over issue arising under Department of Energy Organization Act).

[Economic Stabilization Act, §211(b) (2)] and of the Emergency Petroleum Allocation Act, 15 U.S.C. §754. *Atlantic Richfield Co.* v. *Department of Energy*, 655 F.2d 227, 233 (TECA 1981).

It is clear that the issue decided by the District Court was *not* an EPAA issue, but was rather an issue of state law. The District Court resolved the issue of allocation of stripper well pricing benefits among participants in a unit agreement. The federal regulations are clear that the allocation of stripper well pricing benefits is a matter of state law:

> "Although some comments suggested that FEA prescribe the method for allocating this quantity of upper tier crude oil among the participating leases, FEA has determined that this allocation is more properly a matter for private resolution among participants of the unit agreement." 41 Fed. Reg. 4931, 4937 (February 3, 1976), 5 Energy Mgmt. Rep. (CCH) ¶40, 257 at 40,426.

Exxon has already attempted to convert this contract dispute into a regulatory one by seeking, subsequent to the commencement of litigation between the parties, an interpretation by the Department of Energy ("DOE"). The DOE rejected Exxon's attempt. The DOE expressly and specifically confirmed that this dispute is a matter of Texas state law:

> "Moreover, Exxon's question relating to the validity of Francis' certifications in reference to the proportion of crude oil claimed by Francis *is a matter that state law must resolve, based upon the written and oral agreements and understandings of the participants in the Yates Field Unit.*" (Department of Energy Response to Exxon Request for Interpretation, dated March 22, 1978 (emphasis added).[13]

[13]The Department's letter is reproduced as Appendix D to this Petition, pp. A-27 to A-30.

The District Court carefully noted that "both parties agree that the FEA intended the allocation of imputed stripper oil is a matter left to private agreement which is controlled by state law". (Amended Summary Judgment, App. C at A-20). Pursuant to that understanding, the District Court first examined the Unit Agreements in light of Texas *state* law to determine the intent of the parties. The District Court concluded that "the unit agreement does not purport to control allocation of proceeds." (Amended Summary Judgment, App. C at A-19).[14]

The District Court then reviewed the federal energy regulations for the sole purpose of determining whether those regulations changed the outcome dictated by state law. As a matter of state law, the District Court had determined that the Unit Agreements did not allocate proceeds, that is, the pricing categories of crude oil. An examination of the federal regulations led the District Court to the obvious conclusion that the regulations did not change what state law would otherwise hold: the petitioners retained the exclusive right to market the crude oil allocated

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[14]That the District Court's analysis was premised on state law is made manifest in its opinion:

> Both parties agree that the FEA intended that the allocation of imputed stripper oil is a matter left to private agreement which is controlled by state law. The parties disagree, however, as to whether it was incumbent on Plaintiffs to specifically reserve their original stripper rights to themselves or whether it was incumbent on Defendants to specifically impute Plaintiffs' stripper pricing rights to all the other interest owners in the unit. (Amended Summary Judgment, App. C. at A-20)

The District Court went on to conclude that state law imposed upon the respondents the burden of specifically imputing stripper pricing rights to all the other interest owners in the unit. Federal regulations were examined only to the extent necessary to determine that these regulations did not pre-empt otherwise clear and controlling state law. TECA, on the other hand, concluded that the DOE did not mean what it said and concluded that federal law places the burden on the petitioners. This was an important, albeit totally erroneous, decision of federal law and constitutes an independent reason for this Court granting certiorari. See, *infra*, at pp. 14 to 18.

to their tracts.[15] The District Court then concluded its analysis:

> "The pricing benefits of stripper oil were *not unitized and thus were not imputed to the remainder of the interest owners in the unit.*" (Amended Summary Judgment, App. C at A-21). (emphasis added)

The regulatory history is clear that the FEA did not intend to alter state law in the allocation of these pricing benefits.

That TECA's decision is in conflict with decisions of other circuits is best illustrated by the Fifth Circuit decision in *United States* v. *Uni Oil, Inc.*, 646 F.2d 946 (5th Cir. 1981). The Fifth Circuit was considering whether prosecutions for RICO violations, alleged mail fraud, commercial bribery and other criminal offenses arising out of the defendants' attempts to miscertify old and new oil were within the exclusive appellate review of TECA. The Fifth Circuit concluded that the Fifth Circuit, not TECA, had jurisdiction, analyzing that:

> "The crucial question is whether the case involves issues that must be decided by TECA in order that 'uniform interpretation of the substantive provisions of the' statute may be achieved." *Id.*, 646 F.2d at 951.

See also, *Bray* v. *United States*, 423 U.S. 73, 74 (1975). It is clear that uniform interpretation is not desired in this case. The administrative agency has explicitly made a policy decision to permit state private contract law to govern the

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[15] TECA was therefore incorrect in asserting:

> "Ironically, the district court's ruling (based on its interpretation of the regulations) that only the pre-unitization stripper well property owners retained the imputed exemption was itself an allocation to particular participants; a decision the FEA stated was to be left to private resolution." App. A at A-14.

TECA's misreading of the District Court's judgment significantly contributed to TECA's unwarranted assertion of jurisdiction.

allocation of stripper well pricing benefits under a unitization plan. That policy choice necessarily permits and indeed demands a non-uniform interpretation. The federal policy affirmatively demands that the unit participants, rather than federal law, determine the issue by private contract.[16]

TECA's assertion of jurisdiction in this case is therefore directly in conflict with the Second Circuit's decision of *Coastal States Marketing, Inc., supra,* and the Fifth Circuit's decision of *Uni Oil, Inc., supra.* TECA's statement that "this dispute can be resolved only through an interpretation of the regulations and that such an interpretation will control the litigation" (App. A at A-7) is so patently incorrect as to be a departure of jurisdictional magnitude from its prior precedents. The District Court carefully heeded the Department of Energy's advice that the allocation of stripper oil in a unit is a matter of *private contract,* not federal energy law. TECA in essence held that any case having an "EPAA issue" is within its jurisdiction.[17] This Court should grant certiorari in order to resolve this conflict and to authoritatively delineate TECA's jurisdiction.

B. Important question of federal law: This Court should grant certiorari because TECA has decided an important question of federal law which has not been settled by this Court. Supreme Court Rule 17(c). As discussed earlier, *supra* at pp. 9 to 14, TECA construed the imputed stripper oil regulations to require an affirmative contractual

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[16]The Fifth Circuit is the appellate court of expertise insofar as the interpretation of Texas state law is concerned, having appellate jurisdiction over Texas federal district court orders and judgments. See 28 U.S.C. §41.

[17]TECA's rationale for its jurisdictional assertion is strikingly identical to the position once espoused by the Tenth Circuit in disclaiming jurisdiction and subsequently rejected by this Court in *Bray v. United States*, 423 U.S. 73 (1975).

provision in order for the pre-unitized stripper tract owners to individually avail themselves of the imputed stripper oil pricing.[18] In so construing the federal regulations, TECA completely disregarded the Department of Energy's own interpretation of its regulation. Specifically, TECA held:

> As we have seen, the imputed stripper well exemption in fact was an attempt by the federal agency to prevent the total loss of credit for production from previously marginal properties. This does lead, however, to the question that ultimately separates the parties in this case; how should the unit's imputed stripper well exemption be allocated among the participants?
>
> It is in this respect that the federal regulations were intended to be neutral. The preamble to section 212.75, immediately following the description of the imputed stripper well exemption, states:
>
> > Although some comments suggested that FEA prescribe the method for allocating this quantity of upper tier crude oil among the participating leases, FEA has determined that this allocation [is] more properly a matter for private resolution among participants of the unit agreement.
>
> 41 Fed. Reg. at 4937. What FEA envisioned is readily apparent: preserving the possibility of a stripper well exemption would remove any disincentive to unitization on the part of owners of stripper well properties; and these owners could

[18]On the other hand, under Texas state law, the Unit Agreement (and the intent of the parties to it) required the contrary result. The District Court reviewed all the evidence and found the position of respondents totally at odds with the contract and the understanding of the parties. TECA, in reversing the District Court, has pre-empted and reversed state law, despite the Department of Energy's express mandate that federal law be neutral.

> use the prospect of an imputed exemption as a bargaining chip to negotiate favorable terms in the unit agreement." App. A at A-13, 14.

TECA's definition of "neutral" in context of the imputed stripper oil regulation turns the regulation on its head.[19] The regulation was adopted to eliminate a perceived significant disincentive for stripper well owners to consent to unitization. Without the special provision, the creation of a unit would have destroyed the "stripper well property" quality of individual tracts through aggregation of production, threatening the loss of higher prices available as stripper well oil. 41 Fed. Reg. 4931 at 4936-7 (February 3, 1976), 5 Energy Mgmt. Rep. (CCH) ¶ 40,257 at 40,426. The regulation was obviously intended to be an inducement to the stripper tract owners to consent to unitization. TECA's opinion makes that consent hazardous absent an express negotiated provision granting the preunitized stripper tract owners the stripper well pricing benefits. It would be perverse to construe the regulation to reward the unit which

[19]Unfortunately TECA's treatment of the "neutral" issue is not unique in its misunderstanding of the relevant regulations. In footnote 7 of its opinion, TECA notes that the named petitioners only sought to certify 40 barrels of imputed daily oil production as stripper, rather than their total imputed quantity, and thought that undermined the petitioners' case. *TECA's observation, coming from a court ostensibly having expertise in this area, is ludicrous.* Petitioners were specifically limited to a daily stripper certification of 40 barrels (the amount of stripper oil Tract 117 produced daily before unitization) by 10 C.F.R. §212.75(b)). §212.75(b) restricted imputed stripper oil in units formed before August 1, 1977 (such as the Yates Field Unit) to the amount of stripper oil produced from the tracts constituting the unit prior to unitization. See discussion, 43 Fed. Reg. 33694 (Aug. 1, 1978), [1974-1981 Transfer Binder-Regulation Preambles] Energy Mgmt. Rep. (CCH) ¶ 42 383, at p. 40,929. Far from undermining petitioners' position, the named petitioners' consistent and correct application of the certification rules undermines TECA's incredible opinion and judgment.

contains sripper tracts at the expense of this stripper tracts, yet TECA's opinion does precisely this. It arbitrarily imposes the negotiating burden on the stripper tract owners, not upon the unit which stands to benefit from inclusion of the tract within its coverage. *The Department of Energy expressly declined to adopt this postion.* Rather, it elected to have state contract law decide the allocation issue.

The Department of Energy authoritatively stated its interpretation of its own regulation when it refused Exxon's Request for an Interpretation:

> "...Exxon's question relating to the validity of Francis' certifications in reference to the proportion of crude oil claimed by Francis is a matter that state law must resolve, based upon the written and oral agreements and understandings of the participants in the Yates Field Unit." (Response of the Department of Energy of March 22, 1978, App. D at A-29).

As been shown *supra,* at pp. 9 to 14, the District Court meticulously followed the Department's interpretation. The District Court examine *state* law and determined that under *state* law, the plaintiff class was entitled to prevail on summary judgment. TECA choose to reverse the District Court's interpretation of state law in the guise of interpreting the meaning of the regulation's neutrality.

Furthermore, TECA misunderstood the District Court's holding. The District Court did not hold that the federal regulations left the imputed exemption to the pre-unitization stripper tract property owners. As is clear from the District Court's judgment, the District Court held that *Texas contract law* would allocate to the pre-unitization stripper tract property owners the imputed exemption under the particular unit agreements involved in the case.

TECA's misunderstanding of the District Court's judgment significantly contributed to its erroneous perception that the federal regulations were crucial to the District Court's reasoning.

TECA's construction of the imputed stripper oil regulation negates the Department of Energy's clear intention that state law determine the allocation of imputed stripper oil. Under TECA's analysis, the federal regulations create a presumption of allocation among all unit participants, rebuttable only by a clear contractual stipulation to the contrary. Justice Brandeis could have been describing TECA's concept of neutrality when he was said to have commented:

> "Neutrality is at times a graver sin than belligerence." quoted in Goldman, ed., *The Words of Justice Brandeis.* (1954).

As TECA's interpretation of the imputed stripper oil regulation presents issues of national economic importance, this Court should grant a writ of certiorari.

CONCLUSION

For the foregoing reasons, the petition for a writ of certiorari should be granted and the case set for briefing and argument this term.

Respectfully submitted,

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CERTIFICATE OF MAILING

I, J. Michael Medina, certify that on this 15th day of September, 1982 placed in the United States mail at Washington, D.C. three true and correct copies of the above and foregoing Petition for a Writ of Certiorari, with correct postage prepaid thereon, addressed to:

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Temporary Emergency Court of Appeals of the United States

No. 5-78

FRANCIS OIL AND GAS, INC., CURTIS S. GREEN, DAVE R. SYLVAN, GEORGE D. DALY, GEORGE B. KAISER, and DON H. NELSON, individually, and on behalf of all other persons similarly situated, collectively, and as a class, PLAINTIFFS-APPELLEES,

v.

EXXON CORPORATION and MARATHON OIL COMPANY, individually and on behalf of all other persons similarly situated, collectively, and as a class, DEFENDANTS-APPELLANTS.

On Appeal from the United States District Court for the Western District of Texas

(P-80-CA-22)

(Argued: June 28, 1982 Decided: August 16, 1982)

DAVID J. BECK, Fulbright & Jaworski, Houston, Texas, with whom David L. Tolin of the same firm; James R. Stevens, Exxon Corporation, Houston, Texas; Robert J. Pickins, Marathon Oil Company, Houston, Texas; and William B. Browder, Jr., Stubbeman, McRae, Sealy, Laughlin & Browder, Midland, Texas, were on the brief, for Defendants-Appellants.

FREDERIC DORWART, Holliman, Langholz, Runnels & Dorwart, Tulsa, Oklahoma, was on the brief, for Plaintiffs-Appellees.

Before INGRAHAM, ESTES and POINTER, Judges.

INGRAHAM, Judge:

This dispute arises out of the unitized oil and gas operations in the Yates Field in Pecos and Crockett Counties, Texas. Francis Oil & Gas, Inc., and various individuals (hereinafter "appellees") sought a declaratory judgment from the district court that the unit agreements governing the Yates Field Unit "did not effect a reallocation and cross-conveyance of the rights to and benefits of stripper well pricing and therefore left the rights to and benefits of stripper well pricing in the owner of the oil and gas rights in respect of the tract from which the oil is produced." On cross-motions for summary judgment, the district court entered summary judgment granting appellees' request. Exxon Corporation and Marathon Oil Company (hereafter "appellants") appeal. We find that the declaration requested by appellees was, to say the least, inaccurate and misleading, and accordingly the declaratory judgment should have been denied. We therefore reverse and remand with instructions to enter summary judgment on appellants' motion.

I — BACKGROUND

"Stripper" wells are generally defined as wells that produce such a small volume of oil that the income derived provides only a small margin of profit, or none at all. See 8 Williams & Myers, Oil and Gas Law 729 (1981). For federal energy regulatory purposes a stripper well is one that produces ten barrels a day or less. *See, e.g.*, 10 C.F.R. § 212.54 (1977). In 1973, at the outset of petroleum price controls, Congress noted that stripper wells accounted for 71% of the total number of wells in the country but only 13% of the total domestic crude production. Conf. Rep. 924, 93d Cong., 2d Sess., *reprinted in* 1973 U.S. Code Cong. & Ad. News 2523, 2532 (Joint Statement of the Committee of Conference on the Trans-Alaska Pipeline Authorization Act of 1973, P.L. 93-153).

Congress desired to provide an incentive for producers to maintain these known sources of domestic crude oil

and keep them in production longer than would ordinarily be economically feasible. *Id.* Accordingly, oil produced from stripper well properties enjoyed a preferred status throughout the history of price controls. We have retraced the treatment of stripper well oil in detail in other contexts, *see, e.g., Sauder v. Department of Energy*, 648 F.2d 1341, 1342-43 (TECA 1981); *Energy Reserves Group, Inc. v. Department of Energy*, 589 F.2d 1082, 1087-91 (TECA 1978). For present purposes it is sufficient to recapitulate that stripper well oil was either entirely exempt from price control, *see, e.g.*, Emergency Petroleum Allocation Act of 1973, § 4(e)(2)(A), Pub. L. 93-159, 87 Stat. 627, 632 (1973), or placed in the "upper tier,"[1] 41 Fed. Reg. 4931, 4940 (Feb. 3, 1976) (codified at 10 C.F.R. § 212.74(a)), from 1973 until the expiration of petroleum price controls in January 1981. Exec. Order No. 12287, 3 C.F.R. 124 (1982).

On February 3, 1976, the Federal Energy Administration (predecessor to the Department of Energy) promulgated Section 212.75(e), 41 Fed. Reg. 4931, 4941 (Feb. 3, 1976), to deal specifically with the problem of inclusion of stripper wells in units such as the Yates Field Unit. Unitization agreements combine the separate tracts in a field so that the field may be operated as a single tract without regard to surface property lines. Unitary operation is particularly appropriate where the reservoir has passed its primary production phase and secondary,

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[1] As Judge Christensen recently explained in *Pennzoil Co. v. Dept. of Energy*, 680 F.2d 156 (TECA), *petition for cert. filed*, 50 U.S.L.W. 3998.20 (June 18, 1982), the federal price control regulations set up a two-tier system to determine the ceiling price for crude oil. The quantity of oil produced in a historical base period was labeled the "base production control level" (BPCL); any current production at or below the BPCL was "old oil" and was priced at the lower tier ceiling; production above the BPCL was "new" oil and could be sold at the upper tier ceiling. For a detailed description of the two-tier system, see the cases collected in *Pennzoil, supra*, at 161.

"enhanced" recovery operations, for example, converting some wells to injection wells and shutting in others, are required to prolong and increase production. *See generally Sauder v. Department of Energy*, 648 F.2d 1341, 1342 (TECA 1981). As the FEA explained, "prior regulations might have discouraged producers of stripper well leases from entering unitization agreements because of the potential loss of the property's uncontrolled (now upper tier) status." 41 Fed. Reg. at 4937. The FEA explained that this loss would occur if the increased production resulting from unitization caused the previously-qualified stripper wells' allocation of crude oil to exceed ten barrels per day. In order to remove this disincentive to unitization, the FEA devised an exemption, subsequently labeled the "imputed stripper well exemption," see 41 Fed. Reg. 48319, 48320 (Nov. 3, 1976) (codified at 10 C.F.R. § 212.75(f)), permitting units to recognize and continue to benefit from the pre-unitization stripper well status of individual tracts. This case requires us to unravel the imputed stripper well exemption for the Yates Field Unit.

Appellees own working interests in Tract 117 in the Yates Field. Prior to July 1, 1976, this property qualified for stripper well treatment and appellees sold forty barrels of crude oil per day from the property at stripper well prices. On July 1, 1976, the Yates Field Unit Agreements became effective and a unit-wide BPCL was calculated. From July 1976 to September 1980, appellees were under contract to sell their share of the Yates Field production to appellant Exxon Corporation. In their certifications[2] to Exxon classifying the production as old,

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[2] Every producer was required by 10 C.F.R. § 212.131 to certify to purchasers the amounts of new, old and stripper oil it was producing for sale, as well as other information. Although appellees have made comments in their brief and during oral argument complaining that Exxon's failure to pay according to their certifications is itself a violation of the

new or stripper oil, appellees continued to count forty barrels per day at the higher stripper well prices. Exxon, however, calculated appellees' share of the imputed stripper well exemption based on information provided by the Unit Operator, appellant Marathon Oil Company; specifically, Exxon applied the "tract participation" allocation formula provided in the unit agreements, thus crediting appellees with a share of the unit's imputed stripper well exemption proportional to the size and historic production of their tract. This share of the imputed stripper well exemption was less than forty barrels per day. Exxon's payments to appellees, accordingly, were lower than the certified amounts, at least with respect to stripper oil.

Appellees brought suit in a Texas state court for a declaratory judgment that they were entitled to sell forty barrels of crude oil per day at stripper prices.[3] Appellants removed the case to the United States District Court for the Western District of Texas. After discovery, briefing and oral argument the district court entered summary judgment (and shortly thereafter an "amended summary judgment") for appellees. The district court adopted appellees' theory that the unit agreements allocate only production and not proceeds (or "pricing benefits"). The underlying question, the district court stated, was the legal status of the stripper wells after unitization. The court concluded, after examining the regulations, that once an individual property qualified for stripper well status it retained that status de-

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applicable regulations, no certification-related question has been litigated or properly raised on appeal in this case and we venture no opinion in that area.

[3] Three related suits were filed in federal and state courts in Oklahoma and Texas. The latest development appears to be *Francis Oil & Gas, Inc. v. Exxon*, 661 F.2d 873 (10th Cir. 1981), in which the Tenth Circuit reversed the dismissal of one of Francis' Oklahoma suits for failure to join indispensable parties.

spite subsequent unitization, and that the "pricing benefits of stripper oil were not unitized and thus were not imputed to the remainder of the interest owners in the unit." Consequently, the court believed that the imputed stripper exemption "does not indicate . . . that stripper oil is automatically imputed to other interest owners if and when the stripper tract unitizes with non-stripper tracts." Because the appellees had done nothing to voluntarily contribute any of their "pricing benefits" to the unit, according to the court, they were still entitled to claim the full pre-unitization forty barrels per day.

II — Appellate Jurisdiction

At the outset appellees argue that this appeal does not fall within the limited statutory jurisdiction of this court. We disagree. Section 211(b)(2) of the Economic Stabilization Act of 1970 granted TECA "exclusive jurisdiction of all appeals from the district courts of the United States in cases and controversies arising under this title or under regulations for orders issued thereunder." 12 U.S.C. § 1904 note (Supp. 1977). This provision was incorporated in section 5(a)(1) of the Emergency Petroleum Allocation Act of 1973, 15 U.S.C. § 754 (a)(1) (1976), which extends TECA jurisdiction to appeals "arising under" the petroleum pricing and allocation regulations. While it is true that TECA has no jurisdiction to consider purely private contract law claims, *see Atlantic Richfield Co. v. Department of Energy*, 655 F.2d 227, 233 (TECA 1981), a damage claim "in the breach of contract sense" that alleges entitlement to a specific price based upon the federal price regulations clearly falls within TECA's jurisdiction. *Mountain Fuel Supply Co. v. Johnson*, 586 F.2d 1375, 1381 (10th Cir. 1978), *cert. denied*, 441 U.S. 952 (1979). We have articulated two principal inquiries: whether resolution of the litigation in its entirety requires the application or interpretation of the Emergency Petroleum Allocation Act and implementing regulations, *Citronelle-*

Mobile Gathering, Inc. v. Gulf Oil Corp., 591 F.2d 711, 716 (TECA), *cert. denied*, 444 U.S. 879 (1979); and whether an EPAA isuse has been adjudicated in the court below. *Texaco, Inc. v. Department of Energy*, 616 F.2d 1193, 1198 (TECA 1979).[4]

In light of these standards our jurisdiction in this case is unmistakable. Appellees claim they are entitled to favorable treatment under a specific federal regulatory provision, the stripper well exemption. Their entitlement to this price or any other, during the period in question, was entirely governed by the federal price control regulations. Appellees candidly represented this reliance on the regulations in, among other places, their Brief in Support of the Named Plaintiffs' Motion for Class Action Certification. This document states that "the case does involve certain pricing rights and benefits which, although allocated by private agreement, are set by federal law," and that there was a "crucial relationship between the (unit agreements) and the federal regulations . . . ." Not only does the claim here rest almost entirely upon the federal regulations, as in *Mountain Fuel Supply, supra*, but it is evident that this dispute can be resolved only through an interpretation of the regulations and that such an interpretation will control the litigation. *Citronelle-Mobile Gathering, supra*, 591 F.2d at 716.

Moreover, as even our brief quotations from the district court's decision indicate, that decision rests significantly on the court's analysis of the federal regulations. The ruling that the imputed stripper well exemption and other regulations did not automatically impute stripper well oil to all interest owners in a unit, for

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[4] *See also United States v. Uni Oil, Inc.*, 646 F.2d 946, 949 (5th Cir. 1981), *cert. denied*, 102 S.Ct. 1254 (1982) (observing that "if the district court adjudicated an EPAA issue, we lack jurisdiction"); *Coastal States Marketing, Inc. v. New England Petroleum Corp.*, 604 F.2d 179 (2d Cir. 1979).

example, is crucial to the court's conclusion that pre-unitization stripper well properties retain their full exemptions upon unitization. An EPAA issue was thereby adjudicated, and TECA is the only court with jurisdiction to review the decision.

III — The Imputed Stripper Well Exemption and The Yates Field

Appellees strenuously argue that this case hinges on an interpretation of the unit agreements, as a matter of state law, and that the federal regulations are "neutral" regarding the outcome. As the preceding discussion of jurisdiction may suggest, however, we believe a relatively straightforward analysis of the federal regulations resolves the case, and that the appellees misapprehend the sense in which the regulations are "neutral."

We begin with the definition of "property." As the Federal Energy Administration observed, "the property concept lies at the heart of the crude oil regulatory scheme." 41 Fed. Reg. 4931, 4938 (Feb. 3, 1976).[5] The stripper well exemption itself applied only to a "property" that produced ten barrels per day per well or less. *See* 10 C.F.R. § 210.32 (1976).[6] Section 210.32 further provided as follows:

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[5] This comment appears in the preamble to 10 C.F.R. § 212.75(e), the first imputed stripper well crude oil exemption. Preambles have considerable explanatory value and we consider them, throughout this discussion, in construing the regulations. *See Wiggins Bros. v. Dept. of Energy*, 667 F.2d 77, 88-89 (TECA 1981), *cert. denied*, —— U.S. —— (1982).

[6] The regulations continuously spoke in terms of "property" despite the various amendments applicable to stripper wells. During the first "exempt" period, from 1973 to February 1976, the definition was contained in 10 C.F.R. § 210.32 and its predecessor, 6 C.F.R. § 150.54(s)(2) (1974). When stripper well crude was moved from exempt into the upper tier from February to September 1976, the applicable section was 10 C.F.R. § 212.72, 41 Fed. Reg. 4931, 4940 (Feb. 3, 1976). In

> "Property" is the right that arises from a lease in existence in 1972 or from a fee interest to produce crude oil in existence in 1972 and is coextensive with the term "property" used in § 212.72 for purposes of determining "base production control level crude oil."

Id. In Ruling 1975-15, the FEA analyzed the definition of property in the context of unitizations. Emphasizing that "the property concept is one that identifies the *right to produce crude oil*" (emphasis in original), and noting that unitization converts production into a single operation, the Ruling concluded that for post-1972 unitizations, "the property consists of the unit, and the BPCL is the total 1972 monthly production from all of the several leases that now comprise the unit." 40 Fed. Reg. 4832 (Sept. 4, 1975). We upheld these interpretations in *Pennzoil Co. v. United States*, 680 F.2d 156 (TECA), *petition for certiorari filed*, 50 U.S.L.W. 3998.20 (June 18, 1982), and *Grigsby v. Dept. of Energy*, 585 F.2d 1069, 1083-84 (TECA 1978), *cert. denied*, 440 U.S. 908 (1979).[1] The principle that a unitized property is a "single property" for regulatory purposes, *Pennzoil* states, is implicit in the property definition itself. 680 F.2d 156 at 167-168. *See also Sauder v. Dept. of Energy*, 648 F.2d 1341, 1343 (TECA 1981); Ruling 1977-2, 42 Fed. Reg. 4409, 4414-15 (Jan. 25, 1977).

In February 1976, the FEA promulgated section 212.75. 41 Fed. Reg. 4931, 4941 (Feb. 3, 1976). Section 212.75 (a) required producers to calculate a "unit base production control level" at the date of implementation of enhanced recovery operations or when the production patterns within the unit were substantially altered. 41 Fed. Reg. at 4941. This provision was simplified in August 1976 to require that "with respect to each

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November 1976, the exemption was reinstated, effective September 1, and the definition codified at 10 C.F.R. § 212.54, 41 Fed. Reg. 48319, 48323 (Nov. 3, 1976).

unitized property, a producer shall, as of the effective date of unitization, establish a *unit* base production control level." 41 Fed. Reg. 36171, 36184 (Aug. 26, 1976) (emphasis added). This language simply makes explicit and concrete the prevailing view that a unit forms a single property for purposes of calculating the various regulatory classificiations in the federal petroleum pricing scheme.

The provision of most importance to us, the imputed stripper well exemption, was contained in section 212.75 (e). This section provided that a producer of crude oil from a unitized property could sell at upper tier prices "a number of barrels equal to the total number of barrels of crude oil produced from each stripper well lease that constitute the unit during the twelve month period immediately preceding the establishment of a unit base production control level, divided by twelve." 41 Fed. Reg. at 4941. The label "imputed stripper well crude oil" was first applied in a November 1976 amendment, which also renumbered the exemption. 41 Fed. Reg. 48319, 48324 (Nov. 3, 1976) (codifying 10 C.F.R. § 212.75(f)).

The plain language of section 212.75 would seem to make clear that a property qualified as a "stripper well lease" prior to unitization would cease to qualify as a separate property, with a separate exemption, upon unitization; however, the unit would still be able to recognize and benefit from the historical stripper well status of some of its constituent parts through the imputed stripper well exemption. If that conclusion was not sufficiently clear from the text of the regulation itself, the preamble removed any further doubt. We have already referred to the preamble in the preceding discussion but a more detailed quotation is appropriate here:

B. PRODUCTION AND SALE OF UPPER TIER CRUDE OIL FROM UNITIZED PROPERTIES

Stripper Well Leases. FEA has determined that prior regulations might have tended to discourage producers of stripper well leases from entering unitization agreements because of the potential loss of the property's uncontrolled (now upper tier) status. For example, if a stripper well lease is unitized with other, non-stripper well leases, the resultant production rate (when the unit production is averaged over the total number of wells in the unit) might exceed 10 barrels per well per day. The producer might be reluctant to enter the unit in that event unless his share of crude oil production were to be increased significantly.

FEA, therefore, proposed an amendment to the regulations in this regard which provides that when a *previously-qualified* stripper well lease has been unitized with other properties (some or all of which are non-stripper well leases), the stripper well lease is *deemed to contribute to the unit* an amount of upper tier crude oil equal to its average daily production of crude oil, excluding condensate recovered in non-associated production, calculated over the twelve month period immediately preceding unitization. For example, if a stripper well lease with five wells had been producing a total of 38 barrels of crude oil per day (averaged over the preceding twelve month period), the same quantity of crude oil would retain its upper tier status when produced from the unit. Therefore, after unitization, 38 barrels per day of crude oil produced from the unit would continue to be classified as upper tier crude oil and could be sold at the upper tier ceiling price, without regard to whether the unit, as a whole, was producing in excess of its BPCL. Such upper tier crude oil deemed to have been produced from a stripper well lease would be in addition to any upper tier crude oil resulting from production in excess of the unit's BPCL.

41 Fed. Reg. at 4937 (emphasis added). This language makes clear that the previously-qualified stripper well leases retain significance only for purposes of calculating the quantity of imputed stripper oil these leases contributed to the unit.

In light of *Pennzoil*, *Grigsby* and the specific provisions of section 212.75 relating to calculation of a unit BPCL, there can be no serious question that the Yates Field was a single property for regulatory purposes and that the quantities of oil falling into the "old," "new" and "stripper" categories had to be calculated on the basis of the unit as a whole. It is inconsistent with this principle for individual tract owners such as appellees to assert calculations based on their pre-unitization behavior as if unitization had never occurred. More importantly, the appellees lost the ability to claim, unilaterally, a stripper well crude oil exemption when their pre-unitization "property" became part of the unit.[7] Appellees put considerable emphasis on the fact that they took their allocation of oil "in kind," pursuant to the unit agreements, and argue that once they had possession of the oil they could sell it as they pleased. This argument completely overlooks the principle that because this oil resulted from a unitized operation it carried with it regulatory classifications computed on the basis of the unit's production as a whole. Simply taking the oil in kind did not allow appellees to revert to pre-unitization pricing, any more than it would allow appellees to ignore price controls altogether.

Appellees also argue that if joining a unit means an individual tract's stripper well exemption is automatically

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[7] Appellants point out another anomaly in appellees' argument; if it is true that pre-unitization tracts retained the ability to claim, on their individual behalf, a stripper well exemption, then *all* the oil produced from Tract 117 would be eligible for stripper pricing; however, appellees only asked for forty barrels per day, although their allocation was over one hundred barrels. Thus, it is difficult to perceive the theory on which appellees made their claim.

imputed to the unit as a whole, which is our holding in this case, then they were forced to "give up" something that no other individual tract owner "gave up" upon joining the unit. Whether this is true as a factual matter is far from clear. In any event we believe that result is mandated by operation of the regulations outlined above, particularly because of the shift from individual to unit "property" upon which the exemption is based, and the preamble language indicating that the individual lease *contributes to the unit* a volume of stripper well oil. Although appellees do not phrase their argument in constitutional terms, the complaint that they were unfairly deprived of a preferential pricing classification is reminiscent of similar arguments we rejected in *Mapco, Inc. v. Carter*, 573 F.2d 1268 (TECA), *cert. denied*, 437 U.S. 904 (1978), and *California v. Simon*, 504 F.2d 430, 437 (TECA) ("On no theory did appellees have a vested right to a continuation of the preferential treatment"), *cert. denied*, 419 U.S. 1021 (1974). As we have seen, the imputed stripper well exemption in fact was an attempt by the federal agency to prevent the total loss of credit for production from previously marginal properties. This does lead, however, to the question that ultimately separates the parties in this case; how should the unit's imputed stripper well exemption be allocated among the participants?

It is in this respect that the federal regulations were intended to be neutral. The preamble to section 212.75, immediately following the description of the imputed stripper well exemption, states:

> Although some comments suggested that FEA prescribe the method for allocating this quantity of upper tier crude oil among the participating leases, FEA has determined that this allocation [is] more properly a matter for private resolution among participants of the unit agreement.

41 Fed. Reg. at 4937. What FEA envisioned is readily apparent: preserving the possibility of a stripper well

exemption would remove any disincentive to unitization on the part of owners of stripper well properties; and these owners could use the prospect of an *imputed* exemption as a bargaining chip to negotiate favorable terms in the unit agreement. Ironically, the district court's ruling (based on its interpretation of the regulations) that only the pre-unitization stripper well property owners retained the imputed exemption was itself an allocation to particular participants; a decision the FEA stated was to be left to private resolution.

Appellant Exxon's exact calculations are not before us and we do not review their mathematical accuracy. However, appellees' insistence that the imputed stripper well exemption was a non-unitized "pricing benefit," and the district court's apparent adoption of that theory, requires a clarification from this court. The imputed stripper well exemption consistently spoke in terms of a number of barrels of oil, an actual volume of production. *See, e.g.*, 10 C.F.R. § 212.75(f) (1977). This classification of production was identical, in that respect, to upper and lower-tier oil under the two-tier price control scheme. The unit agreements specify a formula for allocating the unit's production on the basis of "tract participation." Appellees admit that this formula controlled the allocation of upper and lower-tier oil. Imputed stripper well crude oil, therefore, should have been allocated in the same manner.[8]

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[8] We do not suggest that the allocation of imputed stripper well oil must inexorably follow the same formula as allocation of upper and lower tier oil: the allocation of various categories of production, we emphasize, was within the control of the contracting parties. The Yates Field Unit Agreements, however, were drafted before section 212.75 was adopted and therefore contained no provision specifically referring to the imputed stripper well exemption. The only provision available, the parties both inform us, allocates all categories proportionately according to tract participation. We hold only that imputed stripper well oil is indistinguishable from other categories such as "old" and "new" oil;

IV — Conclusion

The district court's award of summary judgment to plaintiffs-appellees is reversed, and the case is remanded for entry of an order dismissing this cause on the cross-motion for summary judgment by defendants-appellants.

Reversed and Remanded

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accordingly, if a provision for allocating oil exists it must be applied to imputed stripper well oil in the same manner as the other categories, absent express contractual provisions specifying an alternative allocation.

TEMPORARY EMERGENCY COURT OF APPEALS
OF THE UNITED STATES

No. 5-73

FRANCIS OIL and GAS, INC., et al.,
Plaintiffs-Appellees,

v.

EXXON CORPORATION and MARATHON OIL COMPANY,
Defendants-Appellants.

Before HONORABLE JOE McDONALD INGRAHAM, HONORABLE JOE EWING ESTES and HONORABLE SAME C. POINTER, Judges.

JUDGMENT

This cause came to be heard on the record on appeal from the United States District Court for the Western District of Texas and was argued by counsel.

In consideration whereof, IT IS ORDERED that the district court's award of summary judgment to plaintiffs-appellees is reversed, and the case is remanded for entry of an order dismissing this cause on the cross-motion for summary judgment by defendants-appellants.

FOR THE COURT:

DONNA M. BOLD, Clerk

By:

Patricia L. Krosel
Chief Deputy Clerk

August 16, 1982
(District Court
No. P-80-CA-22)

DONNA M. BOLD
CLERK

BY: _____
DEPUTY CLERK

IN THE
UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF TEXAS
PECOS DIVISION

FILED
FEB. 4, 1982
BY CHARLES W. VAGNER,
Clerk

FRANCIS OIL AND GAS, INC., et al.

v.

EXXON CORPORATION, et al.

NO. P-80-CA-22

AMENDED SUMMARY JUDGMENT

On the 12th day of November, 1981, the parties' Motions for Summary Judgment came on to be heard in this court. After considering the relevant authorities, as well as the oral and written arguments of counsel, the Court hereby GRANTS the Plaintiffs' Motion and DENIES the Defendants' Motion.

The parties agree that the facts in this case are undisputed[1] and the case is ripe for disposition as a matter of law. Plaintiffs certified stripper oil to Defendants but Defendants refused to pay them for the full amount of stripper certified. Instead, Defendants paid Plaintiffs for a quanitity of "imputed stripper oil," which was much less than the quantity Plaintiffs claimed and was calculated from the tract participation formula in the unitization agreement.

Plaintiffs claim they are entitled to be paid for the 40 barrels of stripper oil per day to which they were entitled before the unit agreement or the regulations went into effect because neither the unit agreement nor the federal pricing regulations changed their stripper status. Plaintiffs base

[1]See Attachment A.

their claim on the following premises: (1) the unit agreement addresses only allocation of production—not proceeds, (2) the federal pricing regulations concerning "imputed stripper wells" did not destroy the old stripper status; rather, they allowed the transfer of stripper pricing benefits (which had not theretofore been possible) from actual stripper owners who, for whatever reason, wanted to share their stripper pricing benefits with interest owners who had never actually owned stripper wells in the unit. Plaintiffs contend that stripper oil is imputed to other owners in the unit only by express contractual provisions which did not exist in the unit agreement in controversy.

Defendants claim that the tract participation formula in the unit agreement unitizes the oil recovered for purposes of pricing as well as for production allocation; that, in effect, when a stripper well owner joins a unit, his personal advantage of being able to sell stripper oil at unregulated prcies accrues uniformly to the benefit of the other leaseholders in the unit and he, in turn, gains the advantage of being able to increase his production limit. Defendants also contend that actual stripper status ceased to exist in unitized properties the moment the federal regulations created imputed stripper oil. The Court adopts the Plaintiffs' conclusions for the following reasons:

Plaintiffs' wells were qualified as strippers before they were unitized in the Yates Field Unit Agreement.[2] The Unit Agreement was negotiated and executed before federal pricing regulations went into effect. Plaintiffs exercised their right to take production in kind rather than in cash; therefore, there was no reason for either party to introduce any provision regarding the allocation of proceeds in the unit agreement.

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[2]Although Defendants have made some rumblings about the validity of the wells' qualification, they are estopped from controverting it because they used the wells' stripper status in arriving at and allocating imputed stripper oil to the remainder of the unit.

To support the position that the parties did in fact anticipate allocation of proceeds, Defendants rely on language in § 1.14 of the unit agreement which says that oil and gas rights are

> the rights to explore, develop, and operate lands within the Unit Area for the production of Unitized Substances, *or to share in the production so obtained or the proceeds thereof.* (Emphasis added.)

The Court does not agree with Defendants that the emphasized portion of § 1.14 above means that the parties anticipated allocation of proceeds. Rather, the Court construes the section to mean that the intended purpose of the unitization was twofold: (1) "for the production of Unitized Substances" — i.e., to take advantage of increased production benefits allowed those who unitized, and (2) "to share in [either] (a) the production so obtained *or* (b) the proceeds thereof" — i.e., (a) for those who took in kind to share the increased production and (b) for those who took in cash to share the increased proceeds which resulted from the greater production. The Court finds this interpretation to be wholly in keeping with the tenor of the remainder of the agreement and with the parties' considerations at the time of the execution of the agreement. Therefore, it is clear to the Court that the unit agreement does not purport to control allocation of proceeds.

Defendants next contend that Plaintiffs understood at the time they ratified the Unit Agreement that unitization destroyed their stipper status. They support this position with Plaintiff KAISER's admission that he actively lobbied the F.E.A. to promulgate an additional regulation which would preserve stripper status to the original stripper owners; Defendants also point to other unit agreements[3] which have provisions expressly reserving stripper status to

[3]Conroe and Bumpus field unit agreements.

the original owners of stripper wells. Besides inviting intrinsic evidence to the interpretation of an unambiguous contract, both arguments beg the question of the stripper oil's legal status underlying the contract provision and the new regulations. Plaintiffs say, of course, that the purpose of both the Conroe Field Unit provision and Kaiser's lobbying for an additional regulation reserving stripper status to the original stripper owners was simply to reiterate and to make express the existing, underlying status of stripper oil so that the very controversy which has been presented in this case could be avoided. Therefore, the Court has examined the federal pricing regulations, including those proposed by Kaiser and those actually promulgated and has determined that the federal pricing regulations do not and were not intended to apply to any stripper oil which qualifies under 10 C.F.R. §212.54(c), regardless of whether it had been unitized.

Both parties agree that the F.E.A. intended that the allocation of imputed stripper oil is a matter left to private agreement which is controlled by state law. The parties disagree, however, as to whether it was incumbent on Plaintiffs to specifically reserve their original stripper rights to themselves or whether it was incumbent on Defendants to specifically impute Plaintiffs' stripper pricing rights to all other interest owners in the unit.

The F.E.A. specifically exempted stripper oil from federal pricing regulations. 10 C.F.R. §212.54. Nothing in the regulations conditions or otherwise qualifies this exemption. Those owning interests in stripper oil are free to sell it at whatever price they can command. Defendants contend that the stripper exemption applies only to stripper tracts that have not been unitized, although they can point to no language in the regulation which so conditions the exemption. Their best arguments for the unitization of stripper pricing benefits are (1) the arithmetic simplicty of

allocating stripper proceeds in the same way as stripper production is allocated and (2) the fact that Defendants use the same formula for allocating both proceeds and production where similar unit agreements are involved. Neither argument is persuasive; simplicity is not the determinative factor in contract disputes, and litigation of this controversy may not be as valuable to other interest owners as to these Plaintiffs in the Yates Field Unit.

It is clear to the Court that the stripper exemption applies to stripper tracts which have been unitized as well as to those which have not been. The definition of "imputed stripper well crude oil" in 10 C.F.R.§212.75(b) indicates that stripper oil can be imputed *only* in a unitized property. It does not indicate, as Defendants argue, that stripper oil is automatically imputed to other interest owners if and when the stripper trace unitizes with non-stripper tracts. This interpretation of the regulation is consistent with the case law and other authorities cited by Defendants and leads the Court to conclude that neither the unitization agreement nor the federal regulations changed the status of Plaintiffs' stripper oil. The pricing benefits of stripper oil were not unitized and thus were not imputed to the remainder of the interest owners in the unit. The Defendants were in error in imputing Plaintiffs' stripper pricing benefits to other interest owners in the unit, and Plaintiffs are entitled to recover from Defendants for the stripper oil which was imputed to the other interest owners in the unit.

To insure that there is no misunderstanding about the effect of the Court's ruling, the following elementary hypothetical is offered as an example of the difference in allocation of production and allocation of proceeds where stripper and non-stripper properties have been included in the same unit:

> Tract A is a stripper tract; 40 barrels a day qualify for stripper pricing, and A produces 80 barrels a day.

Tracts B and C are non-stripper tracts. B produces 100 barrels a day; C produces 200.

A's tract participation (for production purposes) which is determined by a unit agreement, is 80/380 of the unit; B's tract participation is 100/380; C's is 200/380.

Unless the parties to the unit agreement have expressly agreed that A's stripper oil will be imputed to B and C, only A has any stripper pricing benefits.

This means that A can sell 40 barrels a day at unregulated prices; its other 40 barrels are subject to federal pricing regulations. All of B's and C's oil is subject to federal pricing regulations.

These conclusions are dispositive of the remainder of Defendants' arguments which the Court has found to be without merit.[5]

Accordingly, it is ORDERED, ADJUDGED and DECREED that Plaintiffs recover from the Defendants for their 40 barrels per day of stripper oil and for their costs of court.[6]

SIGNED and ENTERED this 19th day of January, 1982.

LUCIUS D. BUNTON
United States District Judge

---

[5]Implicit in the Court's conclusion that the stripper exemption found in §212.54 is unqualified is the conclusion that the regulation establishing a base production control level does not affect stripper status.

[6]Members of the Plaintiff class may not each be entitled to 40 barrels per day, but each is entitled to recover for his respective amount of oil qualifying for stripper pricing.

Attachment A

UNDISPUTED FACTS

(1) The named Plaintiffs own interest in oil and gas which originally was produced from Tract 117 of the Yates Field Unit.

(2) MARATHON OIL COMPANY ("MARATHON") is one of the named Defendants and is the unit operator of the Yates Field Unit. EXXON CORPORATION ("EXXON") is the other named Defendant and, until October, 1980, purchased all the oil allocated to Tract 117 from the named Plaintiffs. MARATHON is the owner of a 49.480235% interest in the Yates Field Unit. EXXON is the owner of a 3.141459% interest in the Yates Field Unit.

(3) MARATHON was the principal drafter of the Yates Field Unit Agreement and the Yates Field Unit Operating Agreement. In negotiating the form of the Unit Agreement, MARATHON initially negotiated with the larger working interest owners and after obtaining the consent of these working interest owners offered the final draft to the small interest owners, including the named Plaintiff FRANCIS, on a take it or leave it basis. FRANCIS opted to take it. The final draft of the Yates Field Unit Agreements, as executed by the large working interest owners, underwent only slight modification when later submitted for approval by the other unit participants. The named Plaintiffs were not part of the small group of working interest owners which executed the Unit Agreement prior to submission of the Agreements to the other unit participants for ratification. The tract participation formula appearing in Section 5.1 of the Unit Agreement was not substantively modified after its initial determination by MARATHON.

(4) MARATHON, EXXON, Chevron Oil Co., Gulf Oil Co., Amoco Production Co., Getty Oil Co., Shell Oil Co., and Continental Oil Co. and a small group of other interest

owners executed the Unit Agreements between June 10, 1975 and July 18, 1975.

(5) The named Plaintiffs ratified the Unit Agreements between August 14, 1975 and Octobert 1, 1975.

(6) The Yates Field Unit was approved by the Texas Railroad Commission and thus became effective on July 1, 1976. At that time, MARATHON OIL COMPANY, as unit operator, established the Unit's base production control level ("BPCL").

(7) Prior to Tract 117's inclusion in the Yates Field Unit, Plaintiffs certified Tract 117 for stripper oil treatment under the applicable federal energy regulations.

(8) The oil allocated by the Unit Agreement to Tract 117 was separately and independently marketed by Plaintiffs. Commencing with the month of July, 1976, and ending with the month of September, 1980, the named Plaintiffs sold all the oil allocated by the Unit Agreement to their Tract 117 to Exxon Company, U.S.A., an unincorporated division of the named Defendant, EXXON CORPORATION. The named Plaintiffs, pursuant to the applicable federal regulation, certified to EXXON the amount of old oil, new oil and stripper oil which they were selling.

(9) The named Plaintiffs certified the Tract 117 oil on the basis that forty barrels per day of Tract 117 oil qualified for stripper well pricing benefits. Forty barrels per day was the amount of stripper oil contributed by Tract 117 upon unitization of the Yates Field Unit.

(10) EXXON's payment was not based on the named Plaintiffs' certifications. Rather, EXXON's payments were determined from calculations based on certain information provided by MARATHON. This information included the Unit's monthly production, BPCL, and total unit amounts of imputed stripper oil, upper tier oil and lower tier oil. Neither MARATHON nor any other party except the

named Plaintiffs purported to certify the Tract 117 production to EXXON. To fix the price payable to the named Plaintiffs for their stripper oil, Defendant EXXON used the tract participation formula promulgated by the unit agreement which specified participation based on the producer's trace size relative to the size of the whole unit rather than the grades of oil and its value. The result of the use of the tract formula was that the amount of stripper well oil allocated to the named Plaintiffs was considerably smaller than the actual amount of stripper oil claimed and certified to the Defendant EXXON. EXXON allocated the benefits of stripper well pricing among all unit participants in the same percentages as are provided by the tract participation formula found in Section 5.1 of the Yates Field Unit Agreement.

(11) When this controvery first arose, EXXON sought an opinion of the Department of Energy that MARATHON was the proper party to certify the production from Tract 117. The Department of Energy rejected EXXON's request and opined that the named Plaintiffs were the proper certifying parties and that the issue whether the named Plaintiffs or the other unit participants were entitled to the stripper well pricing benefits was a question of the private contractual agreements of the parties to be decided by state law.

(12) The Plaintiffs and Defendants agree that the question whether the Yates Field Unit Agreement allocates the benefits of stripper well pricing among all unit participants is a question of Texas law. This action is properly before this Court pursuant to 28 U.S.C. §§1332, 1441.

(13) From the early 1970's until the President's Executive Order of January 30, 1981, the price at which crude oil could be sold was controlled by various federal statutes and regulations. As of November 26, 1973, the Cost of Living Council exempted production from stripper well leases from price controls, and on November 27, 1973, the

Emergency Petroleum Allocation Act provided for a similar stripper well lease exemption. The August 29, 1975, Ruling 1975-15, of FEA, interpreted the manner for the operator to compute a Unit's production/level of low priced oil and high priced oil, and did not mention the effect of unitization upon stripper well leases. The regulatory scheme provided for various pricing categories of crude oil, based in part upon the time of first production and the quantity of the oil produced per well.

(14) Stripper well crude oil is crude oil produced and sold from a stripper well property. A stripper well property is:

> "[a] 'property' whose average daily production of crude oil ... per well did not exceed 10 barrels during any preceding consectuive 12 month period beginning after December 31, 1971." 10 C.R.F. §203.54(c).

(15) Under the regulatory scheme, crude oil produced and sold from stripper well properties could be sold at materially higher prices than other oil. The threat of the loss of stripper well pricing benefits served as a significant disincentive for stripper well property owners to consent to unitization.

(16) On February 3, 1976, the Department of Energy established a special rule applying only to unitized properties, 10 C.R.F. 75(b), which allowed stripper well pricing benefits to be imputed to interest owners in the unit who otherwise had no stripper well pricing benefits, and allowed stripper well pricing to continue to extend to a quantitiy of crude oil equal to the total amount of crude oil produced from all stripper tracts in the year preceding the date of unitization. The sum of all such individual stripper tract volumes was defined as the unit's "imputed stripper well crude oil."

(17) The benefit named Plaintiffs realized immediately after they unitized their interests was a production increase of 89 barrels of oil per day (from 40 to 129).

Department of Energy
Washington, D.C. 20461

Mar. 22, 1978

Received
Mar. 27, 1978
HLR&D

Kenneth P. Fountain, Esquire
Exxon Company, U.S.A.
P.O. Box 2180
Houston, Texas 77001

Re: Request for Interpretation
A-112

Dear Mr. Fountain:

This letter responds to the above-referenced Request for Interpretation filed June 24, 1977 by Exxon Company, U.S.A. (Exxon). In that submission, Exxon requested the Federal Energy Administration (now the Department of Energy) to determine whether 10 CFR 212.131(a)(3) of the Mandatory Petroleum Price Regulations requires Marathon Oil Company (Marathon), as the operator of the Yates Field Unit, to certify the volumes of lower tier ("old"), upper tier "(New") and imputed stripper well crude oil which was sold to Exxon by Francis Oil and Gas, Inc. (Francis), a unit participant and working interest owner that takes its oil in kind. Francis has furnished Exxon with a "certificaiton" on a monthly basis which sets forth the number of barrels of old, new and imputed stripper well crude oil sold by Francis to Exxon the previous month. In its submission Exxon states that it regards these certifications as invalid because they conflict with Marathon's operating reports for the Yates Field Unit and Exxon's understanding of the proportion of imputed stripper well crude oil to which Francis is entitled under the Unit Agreement and Unit Operating Agreement. As a result, Exxon has refused to pay the full amount Francis has claimed for certain crude oil certified as imputed stripper well crude oil after July 1, 1976. On April 21, 1977 Francis

sued Exxon in the United States District Court for the Northern District of Oklahoma (Case No. 77-C--16;-B) for money Francis claims Exxon owes it for this crude oil.

A conference to discuss Exxon's request, attended by representatives of the Department of Energy (DOE), Exxon, Marathon and Francis, was held in Houston on March 8, 1978. After the conference, Exxon orally requested that if the Office of General Counsel (OGC) of DOE determines that Francis is a "producer" as defined in § 212.31 and is therefore required to certify sales of the crude oil it takes in kind from the Yates Field Unit, then the OGC should also resolve that Marathon, as unit operator, is required to allocate the amount of old, new and stripper well crude oil among the unit participants, and that there is a presumption that Francis' certifications must be consistent with Marathon's allocation of crude oil.

The Mandatory Petroleum Price Regulations, 10 CFR 212.31, establish that Francis is a "producer" of crude oil from the Yates Field Unit. That section provides:

> " 'Producer' means a firm or that a part of a firm which produces crude oil or natural gas, or *any firm which owns crude oil* or natural gas *when it is produced.*" (emphasis added)

As a producer, Francis is subject to the requirements of 10 CFR 212.131(a)(3)(i):

> "*With respect to each sale of crude oil* from a unitized property for which the producer has determined a unit base production control level, the producer shall certify in writing to the purchaser the number of barrels of [old, new and imputed stripper well crude oil] ...." (emphasis added)

As shown in Exhibit C of Exxon's Request Francis has furnished the required certifications with respect to Francis' monthly sales of crude oil to Exxon.

The Mandatory Petroleum Price Regulations do not require that Marathon, as unit operator, also certify sales made by Francis, a unit participant and working interest owner. From the facts Exxon has presented, it is clear that although Marathon is also a producer within the meaning of 10 CFR 212.31, it does not sell Francis' crude oil and is thus not subject to the certification requirement of 10 CFR 212.131(a)(3) with respect to sales of Francis' oil.

Moreover, Exxon's question relating to the validity of Francis' certifications in reference to the proportion of stripper well crude oil claimed by Francis is a matter that State law must resolve based upon the written and oral agreements and understandings of the participants in the Yates Field Unit. The DOE regulations do not address the allocation by a unit operator of the amount of old, new and imputed stripper well crude oil amongthe unit participants. The regulations have not adopted any presumption that certifications of crude oil sales by a unit participant and working interest owner taking its oil in kind must be consistent with any such allocation voluntarily made by the unit operator. As stated in the preamble to a rulemaking by the Federal Energy Administration revising the Mandatory Petroleum Price Regulations, 41 FR 4931 (February 3, 1976):[1]

> "Although some comments suggested that FEA prescribe the method for allocating this quantity of upper tier crude oil among the participating leases, FEA has determined that this allocation [is] *more properly a matter for private resolution among the participants of the unit agreement.*" (emphasis added)

Accordingly, Exxon's Request for Interpretation is

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[1]At the time of the publication of this preamble, both new oil and stripper well crude oil were considered to be "upper tier crude oil."

dismissed, since it presents legal issues that must be resolved outside the formal interpretations process.

This letter does not constitute a formal interpretation of the Mandatory Petroleum Price Regulations as contemplated by 10 CFR Part 205, Subpart F.

If you have any questions concerning this letter, please contact Merrill Hathaway of my staff at (202) 566-9070.

Sincerely,

Ezra C. Levine
Acting Assistant General Counsel
for Interpretations and Rulings

cc: Frederic Dorwart, Esquire
Counsel for Francis Oil and
Gas, Inc.

B.L. Walters, Jr.
Warren B. Leach, Esquire
Marathon Oil Company

Office - Supreme Court, U.S.
FILED
OCT 19 1982
ALEXANDER L. STEVAS,
CLERK

No. 82-453

IN THE
Supreme Court of the United States
OCTOBER TERM, 1982

FRANCIS OIL & GAS, INC., CURTIS S. GREEN, DAVE R. SYLVAN, GEORGE B. DALY, GEORGE B. KAISER and DON H. NELSON, Individually and on Behalf of All Other Persons Similarly Situated, Collectively and as a Class,
Petitioners,

v.

EXXON CORPORATION and MARATHON OIL COMPANY, Individually and on Behalf of All Other Persons Similarly Situated, Collectively and as a Class,
Respondents.

BRIEF IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI TO THE TEMPORARY EMERGENCY COURT OF APPEALS OF THE UNITED STATES

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October 18, 1982

PRESS OF BYRON S. ADAMS PRINTING, INC., WASHINGTON, D.C.

QUESTIONS PRESENTED

Whether the Temporary Emergency Court of Appeals had jurisdiction to decide—and correctly decided—the issues of (a) whether the interest owners of a former "stripper well lease" who contributed the lease to a unit lost all right to classify and sell at "stripper" prices any barrels of unit production allocated to the unit tract corresponding to such "lease," except that portion of the total unit volume of "imputed stripper well crude oil" allocated by the unit agreement to such unit tract, once a unit base production control level (BPCL) was established pursuant to 10 C.F.R. § 212.75; and (b) whether the method of allocating unit production to tracts on the basis of participation percentages set forth in a formal unitization agreement entered into prior to the promulgation of 10 C.F.R. § 212.75, but effective thereafter, governed allocation of all unit production, including "old oil," "new oil" and "imputed stripper well crude oil," at such time as the unit agreement became effective and a unit BPCL was established pursuant to 10 C.F.R. § 212.75.*

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* Pursuant to Rule 28.1 of the Rules of this Court, respondents provide the following list of their parent companies, subsidiaries (except wholly owned subsidiaries) and affiliates. *Exxon Corporation:* Exxon Pipeline Company, Imperial Oil, Limited, and Reliance Electric Company. *Marathon Oil Company:* United States Steel Corporation, Arctic LNG Transportation Company, Kenai Corporation, and Polar LNG Shipping Corporation.

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CERTIFICATE OF SERVICE

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Francis Oil & Gas, Inc. v. *Exxon Corp.*, 661 F.2d 873 (10th Cir. 1981) 13

Grigsby v. *DOE*, 585 F.2d 1069 (TECA 1978), *cert. denied*, 440 U.S. 908 (1979) 12

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MGPC, Inc. v. *DOE*, 673 F.2d 1277 (TECA 1982) 9

Mountain Fuel Supply Co. v. *Johnson*, 586 F.2d 1375 (10th Cir. 1978), *cert. denied*, 441 U.S. 952 (1979) . 3, 6

Pennzoil Co. v. *United States*, 680 F.2d 156 (TECA), *petition for cert. filed*, 50 U.S.L.W. 3998.20 (June 18, 1982) 12

Texaco v. *DOE*, 616 F.2d 1193 (TECA 1979) 6, 9

United States v. *Uni Oil, Inc.*, 646 F.2d 946 (5th Cir. 1981), *cert. denied*, 102 S. Ct. 1254 (1982) 6, 10

STATUTES:

Emergency Petroleum Allocation Act of 1973, *as amended*, 15 U.S.C. § 751 3

CODE OF FEDERAL REGULATIONS:

10 C.F.R. § 212.75, 41 Fed. Reg. 4931 (Feb. 3, 1976) . 5, 7

10 C.F.R. § 212.54, 41 Fed. Reg. 48319 (Nov. 3, 1976) 8

MISCELLANEOUS AUTHORITIES:

Williams & Meyers, *Oil & Gas Law: Manual of Oil and Gas Terms* (1978) 2

IN THE

Supreme Court of the United States

OCTOBER TERM, 1982

No. 82-453

FRANCIS OIL & GAS, INC., CURTIS S. GREEN, DAVE R. SYLVAN, GEORGE B. DALY, GEORGE B. KAISER and DON H. NELSON, Individually and on Behalf of All Other Persons Similarly Situated, Collectively and as a Class,

Petitioners,

v.

EXXON CORPORATION and MARATHON OIL COMPANY, Individually and on Behalf of All Other Persons Similarly Situated, Collectively and as a Class,

Respondents.

BRIEF IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI TO THE TEMPORARY EMERGENCY COURT OF APPEALS OF THE UNITED STATES

STATEMENT OF THE CASE

This controversy concerns the proper method for allocating total monthly production from the Yates Field Unit,[1] classified into various pricing tiers under Federal Energy Administration (FEA) regulations, among parti-

[1] A crude oil producing unit, such as the Yates Field Unit, located in Pecos and Crockett Counties, Texas, is defined as an area of land, or deposit or pool of crude oil, as to which parties with interests therein are bound to share in the crude production on a specified

cipants in the Unit. This controversy arose because the FEA created a new regulatory classification of crude oil, "imputed stripper well crude oil," after the time the Yates Field Unit Agreement and Unit Operating Agreement were entered into in 1975.

The named petitioners in this case are working interest owners[2] in Tract 117 of the Yates Field Unit.[3] Respondent Exxon Corporation (Exxon) is also a working interest owner in the Unit and purchased all production allocated to Tract 117 from July 1, 1976, when the Unit became operational, until October 1, 1980.[4] Respondent Marathon Oil Company (Marathon) owns almost half the working interest in the Unit and was named Unit Operator under the terms of the Yates Field Unit Operating Agreement.[5]

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basis, and as to which those persons having the right to conduct production operations are bound to share investment and operating costs on a specified basis. Williams & Meyers, *Oil and Gas Law: Manual of Oil and Gas Terms* 624 (1978) (hereinafter cited as "Williams & Meyers").

[2] Interests in oil and gas include both "working interest" and "royalty interest" owners. A "working interest" is defined as the operating interest under an oil and gas lease. The owner of the working interest has the exclusive right to exploit the minerals on the land. By definition, a "royalty interest owner" is owner of a share of the crude oil production from a lease, free of expenses of production. Williams & Meyers, at 511-12 & 655.

[3] The Yates Field Unit consists of 122 "tracts," each comprised of one or more oil and gas leases. Yates Field Unit Agreement, Original Exhibit A, R. 109.

[4] Petition For A Writ Of Certiorari (hereinafter "Petition") at A-23 and A-24.

[5] *Id.* at A-23.

Petitioners initiated the present action on May 27, 1980 by filing a Class Action Petition for Declaratory Judgment in the 83rd Judicial District Court of Pecos County, Texas. Petitioners sought a declaratory judgment construing the effect of the Yates Field Unit Agreement and Yates Field Unit Operating Agreement on so-called "rights to and benefits of stripper well pricing."[6] Respondents removed this case to the federal District Court for the Western District of Texas, Pecos Division, in part because resolution of petitioners' claims would require the adjudication of issues arising out of the Emergency Petroleum Allocation Act (EPAA) of 1973, *as amended*, 15 U.S.C. § 751 *et seq.*[7]

The district court determined that removal was appropriate and that this case should proceed as a bilateral class action.[8] After extensive discovery and briefing, the district court heard oral argument on cross motions for summary judgment. The district court thereafter ruled for the petitioner class and denied respondents' motion for summary judgment on January 15, 1982, later enter-

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[6] Class Action Petition for Declaratory Judgment ¶¶ V, VI, XI, XII, R. 3-4 and R. 6-7.

[7] Petition for Removal ¶ 5, R. 9-10. A complaint alleging a cause of action sounding solely in contract may nevertheless invoke a substantial federal question involving the construction, application and effect of the EPAA and federal petroleum price regulations. *E.g.*, *Mountain Fuel Supply Co.* v. *Johnson*, 586 F.2d 1375, 1380 (10th Cir. 1978), *cert. denied*, 441 U.S. 952 (1979). *See also Citronelle-Mobile Gathering, Inc.* v. *Gulf Oil Corp.*, 591 F.2d 711, 715-16 (TECA), *cert. denied*, 444 U.S. 879 (1979).

[8] R. 415.

ing an "Amended Summary Judgment" by order dated February 3, 1982.[9]

Contrary to the petitioners' assertion that the district court "squarely based its decision on state contract law,"[10] the district court held that FEA regulations at all times contained an exemption for price controls for production from "stripper well leases" and that nothing in the regulations qualified such exemption.[11] On this basis the district court determined that FEA regulations provided for all leases which were "stripper well leases" prior to their inclusion in the Yates Field Unit to be allocated 100% of the total Unit volume of "imputed stripper well oil"—unless petitioners had agreed by express contractual provision to share Unit production in that category with other unit participants.[12] This erroneous approach to the FEA regulatory scheme led the district court to rule for the plaintiff class, finding that the Yates Field Unit Agreement did not contain the express contractual provision the district court believed to be necessary.[13]

Through its interpretation and "examin[ation] [of] the federal pricing regulations,"[14] the district court erroneously concluded that former stripper well leases included in the Yates Field Unit continued to be separate "properties" after the establishment of a unit BPCL and

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[9] R. 2622. The Amended Summary Judgment is Appendix C to the Petition.

[10] Petition at 4.

[11] Petition, Appendix C, at A-17.

[12] *Id.* at A-19 and A-20.

[13] *Id.* at A-20 and A-21.

[14] *Id.* at A-20.

thereby committed an error that permeated the court's opinion. Thus, the district court incorrectly determined that ownership of "imputed stripper well crude oil" was provided by FEA regulations directly to former stripper well leases in a unit.

On appeal the Temporary Emergency Court of Appeals (TECA) determined that this case raised federal energy issues and concluded that it had jurisdiction to review the district court's decision. TECA examined the preamble to section 212.75[15] and concluded that the "language [of the preamble] makes clear that the previously-qualified stripper well leases retain significance only for purposes of calculating the quantity of imputed stripper oil these leases contributed to the unit."[16] Thus, TECA concluded that the district court's determination was contrary to the FEA's own interpretation of § 212.75. Consequently, TECA appropriately reversed and corrected the district court's error.

ARGUMENT

I. THE PETITION SHOULD BE DENIED BECAUSE TECA HAD JURISDICTION AND ITS DECISION DOES NOT CONFLICT WITH OTHER COURTS

The petitioners' principal argument in petitioning this Court is that TECA's carefully considered conclusion that it had jurisdiction over this case conflicts with other decisions of that court and decisions of other courts. Petitioners raised the identical jurisdictional argument before TECA and that court considered and rejected the peti-

[15] The text of 10 C.F.R. § 212.75, the "imputed stripper well crude oil" regulation, is reproduced in the Petition at 2-3.

[16] Petition at A-12.

tioners' assertions.[17] Contrary to petitioners' contention, in this case TECA simply applied the identical jurisdictional standard as applied by other panels of that court and by other courts—whether resolution of the litigation in its entirety requires the application or interpretation of the EPAA and implementing regulations, and whether an EPAA issue has been adjudicated.[18] Applying the traditional jurisdictional standard, TECA correctly concluded that it had jurisdiction over this controversy.

The petitioners now argue that no federal regulatory issue was adjudicated by the district court and therefore TECA never had jurisdiction. Review of the district court's decision and petitioners' representations to the district court confirm that federal energy issues underlie and pervade this litigation. Throughout the district court proceedings petitioners seemed to appreciate fully that their claims required interpretation of FEA's domestic crude oil price regulations. According to petitioners' first brief in the district court:

> [T]he Yates Field Unit, . . . although governed by private contract, is subject to a *supervening federal*

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[17] *See id.* at A-6 and A-7.

[18] *Id. See Citronelle-Mobile Gathering, Inc.* v. *Gulf Oil Corp.*, 591 F.2d 711, 716 (TECA), *cert. denied*, 444 U.S. 879 (1979); *Texaco, Inc.* v. *DOE*, 616 F.2d 1193, 1198 (TECA 1979); *Mountain Fuel Supply Co.* v. *Johnson*, 586 F.2d 1375, 1381 (10th Cir. 1978), *cert. denied*, 441 U.S. 952 (1979); *United States* v. *Uni Oil, Inc.*, 646 F.2d 946, 949 (5th Cir. 1981), *cert. denied*, 102 S. Ct. 1254 (1982).

> *standard* of a set amount of stripper well pricing benefits to be dispersed through the entire unit. . . .[19]

Petitioners later contended, in support of their motion for summary judgment, that their claim to "stripper well pricing benefits is totally dependent on individual tracts qualifying for stripper well pricing *prior* to unitization."[20]

Having bottomed their claims squarely on the "stripper well status" of their leases prior to unitization, the petitioners persuaded the district court to accept their vested rights approach to the FEA regulatory scheme. Now petitioners vigorously protest that TECA, in reversing the district court, improperly turned its specialized, appellate court review on the issues of regulatory interpretation spawned by their own legal theories and assertions.

The district court misconstrued the FEA's policy announcement that made the allocation of imputed stripper well crude oil barrels within a unit a matter solely for the private agreement of unit participants.[21] The district court's decision turned this neutral FEA policy on its head by holding that FEA regulations vested imputed stripper well crude oil in certain, favored unit participants, *i.e.*, those with stripper well leases prior to unitization, subject only to the right of such persons to contract to share their "stripper pricing benefits" with other unit

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[19] Brief in Support of the Named Plaintiffs' Motion for Class Action Certification, at 20-21 (emphasis added), R. 61-62.

[20] Reply Brief in Support of Named Plaintiffs' Motion for Summary Judgment and Answer Brief in Opposition to Named Defendants' Counter Motion for Summary Judgment, at 12 (emphasis in original), R. 2433.

[21] *See* 41 Fed. Reg. 4931, 4937 (Feb. 3, 1976).

participants. The district court's erroneous holding rested on no less than four aberrant "interpretations" of FEA regulations, set forth below, which respondents challenged before TECA and which served as a basis for TECA's acceptance of jurisdiction over this case:

> [T]he federal pricing regulations do not and were not intended to apply to any stripper oil which qualifies under 10 C.F.R. § 212.54(c), regardless of whether it had been unitized.[22]
>
> * * *
>
> The FEA specifically exempted stripper oil from federal pricing regulations. 10 C.F.R. § 212.54. Nothing in the regulations conditions or otherwise qualifies this exemption.[23]
>
> * * *
>
> . . . [T]he stripper exemption applies to stripper tracts which have been unitized as well as to those which have not been.[24]
>
> * * *
>
> . . . [T]he regulation establishing a base production control level does not affect stripper status.[25]

In light of the challenged regulatory interpretations of the district court, TECA correctly concluded that an EPAA question was adjudicated by the district court—the touchstone for determining TECA's jurisdiction to

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[22] Petition, Appendix C, at A-20.

[23] *Id.*

[24] *Id.* at A-21.

[25] *Id.* at A-22, n.5.

hear an appeal.[26] Furthermore, no matter now much lip service petitioners pay to the "state law" basis of their claims, their jurisdictional argument must fail since TECA correctly looked to the nature of the issue presented on appeal to determine whether it had subject matter jurisdiction.[27]

Significantly, the petitioners' own characterization of the so-called "state law" issue decided by the district court conclusively demonstrates that EPAA issues are inseparable from any other conceivable branch of this case. According to petitioners:

> The District Court also held that, as a matter of state contract law, the stripper well pricing benefits [afforded by the federal pricing regulations] after unitization belong to the individual tracts, giving rise to the benefits and are not allocated to other tracts. . . .[28]

TECA recognized that petitioners had raised and the district court had adjudicated an EPAA issue, and that petitioners' lawsuit squarely involved federal pricing regulations. TECA concluded that:

> Appellees claim they are entitled to favorable treatment under a specific federal regulatory provision, the stripper well exemption. Their entitlement to this price or any other, during the period in question,

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[26] *See Texaco, Inc.* v. *DOE*, 616 F.2d 1193, 1198 (TECA 1979); *Coastal States Marketing, Inc.* v. *New England Petroleum Corp.*, 604 F.2d 179, 187 (2d Cir. 1979). *See also* note 17 *supra*.

[27] *See, e.g., MGPC, Inc.* v. *DOE*, 673 F.2d 1277, 1281 (TECA 1982); *Gulf Oil Corp.* v. *DOE*, 639 F.2d 766, 767 (TECA 1981).

[28] Petition at 4.

was *entirely governed by the federal price control regulations.*[29]

The Court of Appeals further concluded that the district court's decision "rests significantly on the court's analysis of federal regulations . . . [and that] an EPAA issue was thereby adjudicated. . . ."[30]

Contrary to petitioners' assertion, *United States* v. *Uni Oil, Inc.*[31] does not conflict with TECA's decision in this case. Indeed, in that case the Fifth Circuit observed that "if the district court adjudicated an EPAA issue, we lack jurisdiction."[32] Moreover, in that case there was no hint that the trial court had interpreted any EPAA regulations whatsoever. Similarly, in *Coastal States Marketing, Inc.* v. *New England Power Petroleum Corp.*,[33] jurisdiction was found lacking and the court concluded that the "appeal therefore rests with the TECA."[34] The Second Circuit concluded that jurisdiction rested exclusively with TECA whenever there existed "adjudications by a district court of an '[Economic Stabilization Act] issue.' "[35]

In this case the district court clearly interpreted the Emergency Petroleum Allocation Act and its implementing regulations. Thus, petitioners' apparent suggestion that the Fifth Circuit should have reviewed the district

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[29] *Id.* at A-7 (emphasis added).

[30] *Id.* at A-7 and A-8.

[31] 646 F.2d 946 (5th Cir. 1981), *cert. denied*, 102 S. Ct. 1254 (1982).

[32] *Id.* at 949.

[33] 604 F.2d 179 (2d Cir. 1979).

[34] *Id.* at 187.

[35] *Id.*

court's decision[36] is curious since that court could not provide meaningful review. That court would be forced to review the application of the Yates Field Unit Agreement and Unit Operating Agreement to the allocation of oil classified as "imputed stripper well crude oil" without being empowered to determine whether that crude oil pricing category described actual barrels of crude oil produced from the unit, or merely created an abstract "right" to sell crude oil at a premium price.

Finally, Part B of petitioners' Petition, entitled "Important question of federal law," confirms the conclusion that this case involves federal regulatory issues that any court other than TECA simply would not be empowered to answer. The petitioners—having conceded that an "important question of federal law" exists—should not be permitted by this Court to protest that TECA lacked jurisdiction because petitioners couched their complaint in state law terms. This blatant inconsistency in petitioners' position further confirms the propriety of the well-considered decision by TECA concluding that it had jurisdiction.

II. TECA CORRECTLY CONSTRUED THE IMPUTED STRIPPER REGULATIONS

The petitioners next complain that TECA improperly construed the imputed stripper well regulations and disregarded the Department of Energy's (DOE) own interpretation of its regulations. More specifically, petitioners attack what they refer to as TECA's "concept of neutrality" in the regulations.[37]

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[36] *See* Petition at 5.

[37] *Id.* at 16-18.

The petitioners raised the identical argument before TECA which prompted that court to comment that petitioners "misapprehend the sense in which the regulations are 'neutral.' "[38] Examining the relevant regulation and the agency comments in the accompanying preamble, TECA concluded that

> [t]he plain language of § 212.75 would seem to make clear that a property qualified as a "stripper well lease" prior to unitization would cease to qualify as a separate property, with a separate exemption, upon unitization; however, the unit would still be able to recognize and benefit from the historical stripper well status of some of its constituent parts through the imputed stripper well exemption.[39]

TECA further concluded that in light of the agency's regulations and several prior TECA decisions,[40] "there can be no serious question that the Yates Field was a single property for regulatory purposes and that the quantities of oil falling into the 'old,' 'new,' and 'stripper' categories had to be calculated on the basis of the unit as a whole."[41]

As to the petitioners' misapprehension of the neutrality of the regulations, TECA concluded that the question ultimately separating the parties in this case was "how should the unit's imputed stripper well exemption be

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[38] *Id.* at A-8.

[39] *Id.* at A-10.

[40] *Pennzoil Co.* v. *United States*, 680 F.2d 156 (TECA), *petition for cert. filed*, 50 U.S.L.W. 3998.20 (June 18, 1982); *Grigsby* v. *DOE*, 585 F.2d 1069 (TECA 1978), *cert. denied*, 440 U.S. 908 (1979).

[41] Petition at A-12.

allocated among the participants."[42] The court concluded that "it is in this respect that the federal regulations were intended to be neutral."[43] In this case the FEA regulations left to private agreements the manner in which the imputed stripper well prices would be allocated among the different participants in the Unit. And, as participants in the unitization of the Yates Field, the petitioners agreed to the participation formula set forth in the Unit Agreement and their share of the imputed stripper crude oil is calculated appropriately under that provision of the private agreement. As recognized by TECA, the district court's ruling that only the pre-unitization stripper well property owners retained the imputed exemption was itself an allocation to particular participants thereby nullifying the FEA's explicit requirement that allocation should be left as a matter of private resolution among participants of the Unit Agreement.[44]

Finally, petitioners attempt to establish a vested right to "stripper well pricing benefits" by implying that the DOE sanctioned petitioners' view of the regulations in responding to a Request for Interpretation filed by Exxon in 1977.[45] As the record reflects in this case, that

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[42] *Id.* at A-13.

[43] *Id.*

[44] The petitioners attempt to portray Marathon's efforts to unitize the Yates Field as a *fait accompli* to the named petitioners. Petition at 6. However, in a related action, *Francis Oil & Gas, Inc.* v. *Exxon Corp.*, 661 F.2d 873 (10th Cir. 1981), the Court contradicted such a portrayal and concluded that "[d]espite the prejudice to Francis in having production from the unit allocated according to tract size, Francis nevertheless signed the Unit Agreement under strong and explicit protest *but with full awareness of the consequences of the terms.*" *Id.* at 875 (emphasis added).

[45] Petition at 8-9, 11, 17, and Appendix D.

assertion is disingenuous at best and merely repeats an argument previously rejected by TECA. Exxon's Request for Interpretation dealt *only* with the question of who, as between petitioners and the Unit Operator, Marathon, was required to supply Exxon with the certifications required by the mandatory crude oil pricing regulations. Exxon's Request for Interpretation went no further than that, and the DOE's response to Exxon's Request for Interpretation deals only with that specific and limited question.[46] TECA therefore properly concluded that "no certification-related question has been litigated or properly raised on appeal in this case."[47]

CONCLUSION

For the foregoing reasons the Petition for Writ of Certiorari should be denied.

Respectfully submitted,

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[46] The DOE's response to Exxon's Request for Interpretation is Appendix D to the Petition.

[47] Petition at A-5, n. 2.

CERTIFICATE OF SERVICE

I, David J. Beck, hereby certify that on the 18th day of October, 1982, three true and correct copies of this Brief in Opposition were placed in the United States mail, correct postage prepaid, addressed to Frederic Dorwart and J. Michael Medina, Suite 700, 10 E. 3rd St., Tulsa, Oklahoma 74103.

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82-453

IN THE

Supreme Court of the United States

October Term, 1982

FRANCIS OIL & GAS, INC., CURTIS S. GREEN, DAVE R. SYLVAN, GEORGE D. DALY, GEORGE B. KAISER and DON H. NELSON, individually and on behalf of all other persons similarly situated, collectively and as a class,

Petitioners,

v.

EXXON CORPORATION and MARATHON OIL COMPANY, individually and on behalf of all other persons similarly situated, collectively and as a class,

Respondents.

REPLY BRIEF OF PETITIONERS IN SUPPORT OF A WRIT OF CERTIORARI TO THE TEMPORARY EMERGENCY COURT OF APPEALS OF THE UNITED STATES

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v.

EXXON CORPORATION and MARATHON OIL COMPANY, individually and on behalf of all other persons similarly situated, collectively and as a class,

Respondents.

REPLY BRIEF OF PETITIONERS IN SUPPORT OF A WRIT OF CERTIORARI TO THE TEMPORARY EMERGENCY COURT OF APPEALS OF THE UNITED STATES

This Reply Brief is filed in support of the Petition for a Writ of Certiorari to the Temporary Emergency Court of Appeals filed by petitioners in this Court on September 15, 1982. Petitioners pray that a Writ of Certiorari be issued to review the judgment of the Temporary Emergency Court of Appeals of the United States entered on August 16, 1982 in this case.

INTRODUCTION

The Brief in Opposition filed by the respondents is a carefully constructed but ultimately unpersuasive attempt

to convince this Court that the Temporary Emergency Court of Appeals ("TECA") did nothing out of the ordinary, decided no issue of substantial federal importance, and does not merit this Court's plenary review. Careful consideration of the Petition for a Writ of Certiorari, taken in the context of the District Court and TECA opinions appended thereto, clearly indicate, however, that a Writ of Certiorari should issue to TECA and that this Court should place this case down for full briefing and argument this term.

The bottom line is this: under state law, the petitioners clearly prevail. Under TECA's interpretation of the federal regulations, the respondents prevail. TECA's interpretation must therefore be erroneous, since neutral regulations, by definition, cannot change the outcome.

ARGUMENT

I. THE DECISION OF TECA CREATES A CONFLICT AMONG THE CIRCUITS CONCERNING THE JURISDICTIONAL PARAMETERS OF TECA. THIS COURT SHOULD GRANT CERTIORARI TO ESTABLISH THE PARAMETERS OF TECA'S JURISDICTION.

The decision of TECA creates a conflict among the circuits concerning the jurisdictional parameters of TECA. This court should grant certiorari to establish the parameters of TECA's jurisdiction. When read carefully, the Brief in Opposition documents that the position taken by TECA in the instant case was the identical position rejected by this Court in *Bray v. United States*, 423 U.S. 73 (1975), rejected by the Second Circuit in *Coastal States Marketing, Inc. v. New England Petroleum Corp.*, 604 F.2d 179 (2d Cir. 1979), rejected by the Fifth Circuit in *United*

States v. Uni Oil Co., 646 F.2d 946 (5th Cir. 1981), *cert. denied*, 102 S.Ct. 1254 and rejected by TECA itself in *Atlantic Richfield Company v. Department of Energy*, 655 F.2d 227 (TECA 1981). These courts have all limited TECA to jurisdiction over cases where an Emergency Petroleum Allocation Act ("EPAA") issue has been *adjudicated*. The respondents' position is that the mere *presence* of EPAA involvement, however tangential to the issues actually adjudicated, gives TECA sufficient jurisdiction to resolve any and all issues raised on appeal.

Respondents' position is revealed, perhaps unintentionally, in their selection of quotations from briefs filed by petitioners below. Respondents obtain solace from petitioners' statement in their Brief in Support of Named Plaintiffs' Motion for Class Action Certification that:

> "[T]he Yates Field Unit, ... although governed by private contract, is subject to a *supervening federal standard* of a set amount of stripper well pricing benefits to be dispersed to the entire unit." (emphasis in the Brief in Opposition, quoted at pp. 6-7 therein).

Careful examination of this statement reveals that petitioners were simply stating a fact not in dispute: the amount of stripper well pricing benefits to be dispersed throughout the entire unit is fixed by federal law. There is no dispute as to how much stripper well pricing benefits are available to the Yates Field Unit. The only question in the litigation is the proper method of apportionment of that fixed amount of stripper well pricing benefits. By the misuse of this statement, respondents have taken the position that simply because the EPAA lurks somewhere in the factual context, TECA has jurisdiction.

Similarly, respondents also quote from a later brief filed by petitioners to the effect that:

> "[their] claim to 'stripper well pricing benefits is totally dependent on individual tracts qualifying for stripper well pricing *prior* to unitization.' " (Brief in Opposition at page 7, quoting from Reply Brief in Support of Named Plaintiff's Motion for Summary Judgment and Answer Brief in Opposition to Named Defendants' Counter Motion for Summary Judgment, at page 12, R. 2433.)

The quoted passage appears grossly out of context. The entire relevant passage is as follows:

> "To the extent relevant, the federal energy regulations overwhelmingly support the plaintiffs' Motion for Summary Judgment.
>
> Throughout Exxon's 23-page excursus on federal regulatory law, Exxon consistently ignores the fundamental premise of the imputed stripper rule. 10 C.F.R. § 212.75(b)(ii). Whatever claim, however specious it may be, the Yates Field Unit participants have to stripper well benefits is totally dependent on individual tracts qualifying for stripper well pricing *prior to* unitization. (emphasis in original)

Read in context, several things become apparent. First of all, the petitioners were not asserting that federal law governs the issues resolved by the District Court. To the contrary, the petitioners' consistent position has been and continues to be that state law governs, and that federal law is not relevant. Federal law was only discussed because of the respondents' insistence on attempting to convert this

case into a federal energy dispute.[1] Secondly, the context reveals that "participants" included any or all the unit participants as a group and not the petitioners. The insertion of the word "their" by respondents is flagrantly misleading. Petitioners claim that their rights to stripper well pricing benefits arise from state law, pursuant to settled interpretations of the Federal Energy Administration and the Department of Energy.

A fair reading of the District Court opinion can only lead to the conclusion that the District Court's review of the federal energy regulations was done only for the limited purpose of determining *whether the federal regulations changed the outcome otherwise dictated by state law.* As a matter of state law, the District Court had determined that the unit agreements did not, and were not intended to, allocate the proceeds of sale of crude oil. An examination of federal regulations led the District Court to the obvious conclusion that the regulations did not change what state law would otherwise hold: *the petitioners retained the exclusive right to market the crude oil allocated to their tracts.*[2]

The TECA decision in the current case stands alone in its expansion of TECA's jurisdictional parameters. Standing alone it creates a conflict with other courts of appeal, the resolution of such conflict being imperative in view of the

[1]In the Reply Brief wherein the material is quoted, the argument immediately preceding the quoted material clearly argues that the right of the petitioners to charge stripper well prices for their oil is a private contractual right to be settled by Texas state law. See Reply Brief, at pp. 7-11, R. 2428-2432.

[2]The cavalier treatment by TECA of the District Court's expert opinion of state law violated the settled principle that a district court's interpretion of state law is entitled to great weight. *See, e.g., Bernhardt v. Polygraphic Co. of America,* 350 U.S. 198 (1956); *Gardner v. New Jersey,* 329 U.S. 565 (1947).

large economic consequences to the oil and gas industry. See *infra*, at page 8.[3]

II. TECA HAS DECIDED A QUESTION OF SUBSTANTIAL FEDERAL IMPORTANCE THAT THIS COURT HAS NOT PREVIOUSLY CONSIDERED. THIS COURT SHOULD GRANT CERTIORARI TO CONSIDER THIS ISSUE OF SUBSTANTIAL FEDERAL IMPORTANCE.

TECA has decided a question of substantial federal importance that this court has not previously considered. This court should grant certiorari to consider this issue of substantial federal importance.

In stating that TECA had decided an issue of federal importance, the petitioners did not suggest that TECA had jurisdiction to decide this issue. Rather, TECA took it upon itself to decide the case on appeal in such a manner to both create and resolve a substantial federal issue: the interpretation of several regulations under the federal

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[3]The cases of *Citronelle-Mobile Gathering, Inc. v. Gulf Oil Corp.*, 591 F.2d 711 (TECA 1979), *cert. denied* 444 U.S. 879 and *Mountain Fuel Supply Co. v. R. Johnson, et al*, 586 F.2d 1375 (10th Cir. 1978), *cert. denied* 444 U.S. 952, are not to the contrary. In both cases the plaintiff sued under breach of contract and the defendant purchaser defended on the basis of illegality under the EPAA. TECA had jurisdiction because

> "the resolution of the litigation in its entirety requires application and interpretation of the EPAA..." *Citronelle, supra*, 591 F.2d at 716.

A decision by TECA on the EPAA issue would thus resolve the entire litigation. In the present case, the dispositive issue is not an EPAA issue but an issue of state law. TECA cannot resolve the entire litigation. See, *Texaco, Inc. v. Department of Energy*, 616 F.2d 1193, 1197 n. 2 (TECA 1979).

energy regulatory scheme. The fact that TECA took it upon itself to decide this issue is not an indication that this issue was properly presented in the case before TECA.

In any event, assuming that TECA had jurisdiction to resolve these issues, TECA's interpretation of the federal energy regulations is clearly erroneous and must be reversed by this Court. The Brief in Opposition has unsuccessfully attempted to disguise what TECA has done. Quite simply, TECA has turned the federal regulatory scheme on its head. While paying homage to the concept of neutrality, TECA has really enviscerated the concept of neutrality and state law determination. According to the dictates of the TECA decision, state law will not govern the allocation of imputed stripper oil. A rebuttable presumption, created by federal law, will govern the allocation of imputed stripper oil. For the stripper tract owner to retain his imputed stripper oil upon unitization, the unitization agreement would have to have a specific and unequivocal reservation of rights in the stripper tract owner. Without this clear and unequivocal statement, federal law will presume that the imputed stripper oil is to be allocated to all the participants in the unit, no matter what the supposedly governing state law would otherwise hold. This result cannot be what the FEA (later DOE) had in mind. The agency on several occasions specifically noted that state law would govern.

The District Court, quite unlike TECA, carefully heeded the principles set forth by the Federal Energy Administration and the Department of Energy. The District Court examined state law to determine the effect of state law on the allocation of imputed stripper oil. After determining that state law would leave those benefits in the stripper tract owner absent a prior unequivocal contractual provision to the contrary, the District Court then examined

the federal regulations for the limited purpose of determining whether those regulations overruled state law. Obviously, the federal regulations could not overrule state law since the federal regulations themselves are to be construed in a neutral fashion, with no bias towards either the stripper tract owner or the unit participants.

Again, the bottom line is this: under *state law*, the petitioners clearly prevail. Under TECA's interpretation of the federal regulations, the respondents prevail. TECA's interpretation must therefore be erroneous, since neutral regulations, by definition, cannot change the outcome.

The significance of the TECA decision in the oil and gas industry is perhaps best summarized by a concise analysis of the decision found in the Executive Report of the Independent Petroleum Association of America, a prominent trade organization of independent producers.[4] In its September, 1982 edition, the report discussed the effect of the TECA decision and requested that this court review the TECA decision:

> **"Will a unitized stripper lease owner be able to claim independent stripper well exemptions? and will TECA claim exclusive jurisdiction to hear appeal of tax cases involving windfall profit tax application of DOE regulations?**
>
> In summary, TECA held that under the imputed stripper well rule 'that a property qualified as a

[4]The Independent Petroleum Association of America was founded in 1929 and has a membership of 5700, composed principally of independent oil and gas operators, land and royalty owners and others interested in the production of crude oil and natural gas. One of its most important functions is to represent the interest of small oil and natural gas producers in legislative and regulatory areas at the federal level. Its executive offices are located at 1101 16 St., N.W., Washington, D.C.

> 'stripper well lease' prior to unitization would cease to qualify as separate property, with a separate exemption, upon unitization; . . . .' The court also held that "...the previous qualified stripper well leases retain significance only for purposes of calculating the quantity of imputed stripper oil these leases contributed to the unit." And "...more important, the (operators) lost the ability to claim, unilaterally, a stripper well crude oil exemption when their preunitization 'property" became part of the unit."
>
> **The TECA decision should be appealed to the U.S. Supreme Court.** (Executive Report at p. 2) (emphasis in the original).

Quite clearly, TECA has decided an important issue of federal law. This court should take the opportunity presented by the Petition for a Writ of Certiorari and definitively resolve the issue that TECA has decided.

CONCLUSION

For the foregoing reasons, the Petition for a Writ of Certiorari should be granted and the case set for briefing and argument this term.

Respectfully submitted,

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OF COUNSEL:

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CERTIFICATE OF MAILING

I, J. Michael Medina, certify that on this 28th day of October, 1982 placed in the United States mail at Washington, D.C., three true and correct copies of the above and foregoing Reply Brief of Petitioners in Support of a Writ of Certiorari, with co. ect postage prepaid thereon, addressed to:

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Attorney for Petitioners

OCT 29 1982

No. 82-453

IN THE

Supreme Court of the United States

October Term, 1982

FRANCIS OIL & GAS, INC., CURTIS S. GREEN, DAVE R. SYLVAN, GEORGE D. DALY, GEORGE B. KAISER and DON H. NELSON, individually and on behalf of all other persons similarily situated, collectively and as a class,

Petitioners,

v.

EXXON CORPORATION and MARATHON OIL COMPANY, individually and on behalf of all other persons similarily situated, collectively and as a class,

Respondents.

ON PETITION FOR WRIT OF CERTIORARI TO THE TEMPORARY EMERGENCY COURT OF APPEALS

MOTION FOR LEAVE TO FILE BRIEF AMICI CURIAE AND BRIEF AMICI CURIAE

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Respondents.

MOTION FOR LEAVE TO FILE BRIEF AMICI CURIAE

The Independent Petroleum Association of America and the National Stripper Well Association, together with:

American Association of Petroleum Landmen
Arkoma Basin Independent Gas Producers Association
California Independent Producers Association
Eastern Kansas Oil and Gas Association, Inc.
Illinois Oil and Gas Association
Independent Oil and Gas Association of West Virginia
Independent Oil Producers Tri-State, Inc.

Independent Petroleum Association of Mountain States
Independent Petroleum Association of New Mexico
Indiana Oil and Gas Association
Kansas Independent Oil and Gas Association
Kentucky Oil and Gas Association
Liaison Committee of Cooperating Oil and Gas Associations
Louisiana Landowners Association, Inc.
Louisiana Association of Independent Producers and Royalty Owners
Michigan Oil and Gas Association
New York State Oil Producers Association
North Texas Oil and Gas Association
Ohio Oil and Gas Association
Oklahoma Independent Petroleum Association
Panhandle Producers and Royalty Owners Association
Pennsylvania Grade Crude Oil Association
Pennsylvania Oil and Gas Association
Permian Basin Petroleum Association
Royalty Owners and Independent Oil and Gas Producers Association of Arkansas
Tennessee Oil and Gas Association
Texas Independent Producers and Royalty Owners Association
Virginia Oil and Gas Association
West Central Texas Oil and Gas Association

hereby respectfully move for leave to file the attached brief Amici Curiae in this case. The consent of the attorneys for all parties to this case was sought by telegram on October 25, 1982. By telephone, Counsel for Petitioners consented, and Counsel for Respondents denied, consent for the filing of the brief. Brief for Amici Curiae was not filed at an earlier time because counsel for Amici Curiae first learned of the pendency of this case in this court on Friday, October 22, 1982.

Interest of Amici Curiae

The Independent Petroleum Association of America (IPAA) is a national trade association founded in 1929 and consisting of some 7,500 members, principally domestic independent explorer—producers and royalty owners of crude oil and natural gas throughout the United States. The National Stripper Well Association (NSWA) is a national trade association founded in 1934 consisting of persons and firms who are primarily producers or royalty owners of stripper well crude oil throughout the United States. The twenty-nine other Amici Curiae organizations are separate, unaffiliated national, state or regional associations of individuals and firms which are explorer-producers or royalty owners of crude oil or engaged in supporting activity to oil producers. The combined membership of all Amici Curiae organizations together represent essentially all of the some 15,000 independent explorer-producers of crude oil and natural gas and several thousand crude oil royalty owners in the United States. The membership of these organizations account for approximately 90 percent of the wildcat exploratory drilling in the United States, drill some 85 percent of all wells in the United States, and have discovered more than 50 percent of the known crude oil and natural gas reserves in the United States.

The decision of the Temporary Emergency Court of Appeals herein challenged is of national significance. It will have a substantial impact on the domestic oil and natural gas industry and the individual members of the Amici Curiae associations. The decision will have a particularly significant impact on small independent oil and natural gas producers. Therefore, the IPAA, NSWA, and other Amici Curiae organizations, on behalf of their members, file this Amici Curiae brief in support of the Petition for a Writ of

Certiorari. The TECA decision raises substantial federal issues which should be resolved by this court.

Respectfully submitted,

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October 29, 1982

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BRIEF AMICI CURIAE

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Arkoma Basin Independent Gas Producers Association
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Independent Petroleum Association of Mountain States
Independent Petroleum Association of New Mexico
Indiana Oil and Gas Association
Kansas Independent Oil and Gas Association
Kentucky Oil and Gas Association
Liaison Committee of Cooperating Oil and Gas Associations
Louisiana Landowners Association, Inc.
Louisiana Association of Independent Producers and Royalty Owners
Michigan Oil and Gas Association
New York State Oil Producers Association
North Texas Oil and Gas Association
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Permian Basin Petroleum Association
Royalty Owners and Independent Oil and Gas Producers Association of Arkansas
Tennessee Oil and Gas Association
Texas Independent Producers and Royalty Owners Association
Virginia Oil and Gas Association
West Central Texas Oil and Gas Association

as Amici Curiae respectfully submit their brief urging this court to grant a Writ of Certiorari to review the judgment of the Temporary Emergency Court of Appeals of the United States in *Francis Oil & Gas, Inc. et. al. v. Exxon Corporation, et. al.*, _____ F.2d _____ (TECA, 1982), entered on August 16, 1982.

INTEREST OF AMICI CURIAE

The Independent Petroleum Association of America (IPAA) is a national trade association founded in 1929 consisting of some 7,500 members, principally domestic independent producers and royalty owners of crude oil and natural gas throughout the United States. The National Stripper Well Association (NSWA) is a national trade association founded in 1934 consisting of persons and firms who are primarily producers or royalty owners of stripper well crude oil throughout the United States. The twentynine other Amici Curiae organizations are separate, unaffiliated national, state or regional associations of individuals and firms which are explorer-producers or royalty owners, of crude oil or engaged in supporting activity to oil producers. The combined membership of all Amici Curiae organizations together represent essentially all of the some 15,000 independent explorer-producers of crude oil and natural gas and several thousand crude oil royalty owners in the United States. The membership of these organizations account for 90 percent of the wildcat exploratory drilling in the United States, drill some 85 percent of all wells in the United States, and have discovered more than 50 percent of the known crude oil and natural gas reserves in the United States.

ARGUMENT

This Court should grant the Petition for Writ of Certiorari of Francis Oil & Gas, Inc., et. al. to review the judgment of the Temporary Emergency Court of Appeals in this case. The issue decided by TECA will have direct significant impact on the entire domestic petroleum industry, its ability to maintain production of domestic stripper well crude oil, and the potential premature abandonment of billions of barrels of proven crude oil reserves. Thus, the issues decided will have significant

impact on the national economy, energy independence, and national security. Further, TECA's decision is contrary to both the intent of Congress and the Department of Energy which drafted and promulgated the imputed stripper well oil rule, and the common understanding and practice within the industry.

I. Special Nature of Stripper Well Crude Oil

The importance and special identity of stripper well crude oil have consistently been recognized by both Congress and the Department of Energy (and its predecessor, Federal Energy Administration) and other agencies of the federal government throughout the history of regulation of domestic crude oil. The marginal economic status of stripper well crude oil is recognized by the creation of the stripper well classification. Seventy-four percent of all U.S. oil wells are stripper wells. In 1981, stripper wells accounted for 13 percent of total domestic crude oil produced and total proven recoverable reserves of 4.4 billion barrels of crude oil.

II. Extension of Holding to Windfall Profit Tax Act

TECA's decision raises important questions as to the interpretation of the imputed stripper well oil rule, both as to the crude oil price control mechanism and implementation of the Crude Oil Windfall Profit Tax Act of 1980 (PL 96-223, Apr. 2, 1980). The decision also raises questions concerning TECA's jurisdiction over regulations of the Internal Revenue Service implementing the Windfall Profit Tax Act of 1980. The Windfall Profit Tax Act (26 USC 4996(b)(8) treats ". . . as continuing in effect without regard to decontrol of oil prices or any other termination of the application of such regulations," the crude oil price control regulations of the Department of Energy, including the imputed stripper well oil rule, for purposes of interpreting and administering the Windfall Profit Tax Act.

III. Decision Contrary to Intent of Congress and Department of Energy

It is quite clear that TECA's decision is directly contradictory to the regulatory intent. The imputed stripper well oil rule was intended to remove the disincentive for stripper well owners to consent to the unitization of their properties. Prior to adoption of the imputed stripper well rule, the creation of a unit which included their property would have destroyed the "stripper well property" classification of individual tracts because of aggregation of production, thereby threatening the loss of the higher prices and exemption from price controls available to stripper well oil. In drafting the regulations, the drafters made the conscious decision to permit state law to govern the allocation of the imputed stripper well oil among the unit participants. 10 C.F.R. Sec. 212.75, 41 Fed. Reg. 4931, 4937 (Feb. 3, 1976). TECA's decision essentially removes state law from that determination. The TECA decision erects a rebuttable presumption that the federal regulation effects an allocation among all the unit participants according to the participation formula in the individual unit agreement, unless a clear and unequivocal statement to the contrary is found in the agreement. It is unclear exactly what residual role state law is permitted to have under the TECA decision. It is clear that even if a state law, absent a specific grant to the unit participants as a whole, would reserve the imputed stripper well oil to the stripper tract owner, that state law could not be determinative. The rebuttable presumption would still remain and the imputed stripper well oil would be distributed among the unit participants. It is ironic that the TECA decision construes the federal regulation to place the burden of negotiation on the individual stripper well tract owner in disregard of the considerable disparity of bargaining power between the individual stripper well

owner and the unit developer even in the best of circumstances. In many states, unitization is mandatory either upon initiative of the state regulatory body or upon initiative of the owners of a certain percentage of the tracts and/or production sought to be unitized. In such instances, the individual stripper well owner has no bargaining power whatsoever. TECA's decision negates the primary intent of the regulation to remove significant disincentives for stripper well owners to enter into unitization. Thus, the decision will impair efforts to maximize production of domestic crude oil and avoid premature abandonment of billions of barrels of known proven crude oil reserves. Such result would be damaging to the national economy, energy self-sufficiency and national security. This alone is cause enough for this court to grant certiorari and review the decision of TECA.

IV. Decision Contrary to Established Industry Practice

The decision of TECA runs contrary to the understanding and common practice and usage in the oil and gas industry. Consequently, TECA's decision will impact substantially on long established relationships that, prior to TECA's decision, remained unquestioned. It has been the practice in the oil and gas industry to assume that under the regulations, absent specific provisions in the unit agreement, the stripper well tract owner retains the imputed striper well oil derived from his tract. Equally important, the stripper well tract owner in all circumstances, irrespective of provisions in the unit agreement, retains his separate identity as a stripper well producer and his ability to claim, unilaterally, a stripper well crude oil exemption. Amici Curiae would note that there was substantial testimony given below in the District Court proceedings concerning industry standards and practices. (See R. 1139-1142).

V. Jurisdictional Issues

This court should review TECA's decision as to its appellate jurisdiction and set forth definitively the jurisdictional parameters within which TECA is confined. TECA's decision in this case constitutes a significant expansion of the jurisdiction understood by other courts of appeal. As noted above, the crude oil price control regulations construed by TECA have been extended beyond the life of the crude oil price control program for purposes of interpreting and administering the Windfall Profit Tax Act of 1980. TECA's decision therefore raises questions concerning its jurisdiction over regulations and activities of the Department of Treasury and Internal Revenue Service with regard both to the treatment of striper well oil and jurisdiction of cases arising under the Windfall Profit Tax Act.

CONCLUSION

For reasons set forth above, IPAA and the other Amici Curiae respectfully request this court to grant petitioners' Petition for a Writ of Certiorari.

Respectfully submitted,

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No. 82-453

IN THE

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October Term, 1982

FRANCIS OIL & GAS, INC., CURTIS S. GREEN, DAVE R. SYLVAN, GEORGE D. DALY, GEORGE B. KAISER and DON H. NELSON, individually and on behalf of all other persons similarily situated, collectively and as a class,

Petitioners,

v.

EXXON CORPORATION and MARATHON OIL COMPANY, individually and on behalf of all other persons similarily situated, collectively and as a class,

Respondents.

JOINT COMBINED MOTION FOR LEAVE TO FILE AMICUS CURIAE BRIEF OUT OF TIME (AND AMICUS CURIAE BRIEF IN SUPPORT OF THE PETITION FOR A WRIT OF CERTIORARI) OF THE TEXAS INDEPENDENT PRODUCERS LEGAL ACTION ASSOCIATION AND THE NORTH TEXAS OIL AND GAS ASSOCIATION

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Petitioners,

v.

EXXON CORPORATION and MARATHON OIL COMPANY, individually and on behalf of all other persons similarily situated, collectively and as a class,

Respondents.

JOINT MOTION FOR LEAVE TO FILE AMICUS CURIAE BRIEF OUT OF TIME

Comes now the Texas Independent Producers Legal Action Association and the North Texas Oil and Gas Association and move this Court to permit them to file their brief as amicus curiae in support of the Petition for a Writ of Certiorari currently before this Court in this cause. As discussed in the brief combined with this motion, both movants are associations of independent oil and gas producers and others interested in the oil and gas industry. The movants' members are directly affected by the decision of the Temporary Emergency Court of Appeals below and believe that the views set forth in the Combined Brief may be useful to the Court in its disposition of the Petition for a

Writ of Certiorari. The petitioners have consented to this motion; the respondents oppose the motion.

Respectfully submitted,

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Petitioners,

v.

EXXON CORPORATION and MARATHON OIL COMPANY, individually and on behalf of all other persons similarily situated, collectively and as a class,

Respondents.

JOINT BRIEF IN SUPPORT OF THE PETITION FOR A WRIT OF CERTIORARI

The Texas Independent Producers Legal Action Association and the North Texas Oil and Gas Association, as amicus curiae, respectfully submit their Brief urging this Court to grant a Writ of Certiorari to review the judgment of the Temporary Emergency Court of Appeals of the United States in *Francis Oil & Gas, Inc. et. al. v. Exxon Corporation, et. al.*, 687 F.2d 484 (TECA 1982), entered on August 16, 1982.

INTEREST OF TEXAS INDEPENDENT PRODUCERS LEGAL ACTION ASSOCIATION

The Texas Independent Producers Legal Action Association ("TIPLAA") is an association formed under

Texas law in 1978 with membership of approximately 150. Its membership consists primarily of Texas independent oil and gas producers. TIPLAA was formed to provide a vehicle for representation of Texas independent oil and gas producers in litigation and research matters. TIPLAA is specifically barred from legislative activities. The president of TIPLAA is Robert Emerson Vinson, whose address is 800 Oil and Gas Building, Wichita Falls, Texas, 76301.

INTEREST OF NORTH TEXAS OIL AND GAS ASSOCIATION

The North Texas Oil and Gas Association ("NTOGA") was formed in 1930 and has approximately 800 members. Its membership is primarily drawn from North Texas area businesses, including independent producers, geologists, landmen, royalty owners, trucking companies, accountants, and banks which have an interest in the oil and gas industry. Its president is John Bennett, and its Executive Vice President is Tom Haywood. The association offices are located at 1106 City National Building, Wichita Falls, Texas, 76301.

The decision of TECA herein challenged is of a national significance and will have a significant impact on the oil and gas industry. The decision will have a particularly significant impact on independent oil and gas producers, who currently own a very substantial portion of stripper oil production in this country. Therefore, TIPLAA and NTOGA, on behalf of their members, file this amicus curiae brief in support of the Petition for a Writ of Certiorari. The TECA decision raises substantial federal issues which should be resolved by this court.

ARGUMENT

This Court should grant the Petition for a Writ of Certiorari to review the judgment of the Temporary Emergency Court of Appeals in this case. TECA has decided issues of substantial national economic significance. Further, TECA's decision is contrary to both the intent of the regulatory draftsmen who drafted the imputed stripper oil rule and the common understanding in the industry.

First, it is quite clear that TECA's decision is contrary to the regulatory intent. The imputed stripper well oil regulation was intended to remove the disincentive for stripper well owners to consent to unitization. Prior to adoption of the imputed stripper well rule, the creation of a unit would have destroyed the "stripper well property" quality of individual tracts because of aggregation of production, threatening the loss of higher prices available as stripper well oil. In the course of drafting the regulation, the drafters made the conscious decision to permit state law to govern the allocation of the imputed stripper well oil among the tract participants. TECA's decision essentially removes state law from that determination. TECA's decision hinders the intent of the regulation to remove significant disincentives for stripper tract owners to enter into units. For this reason, the Court should grant certiorari and review the decision of TECA.

Second, the decision of TECA runs contrary to the customary understanding and practice in the oil and gas industry. Because it runs contrary to the customary understanding in the oil and gas industry, TECA's decision will impact substantially on well established relationships that, prior to TECA's decision, remained unquestioned. It

has been the usual and customary practice in the oil and gas industry to assume that absent specific provision in the unit agreement, the stripper tract owner retains the imputed stripper oil derived from his tract under the regulations.

Third, this Court should review the TECA decision in order to set forth TECA's jurisdictional limits. TECA's decision in this case constitutes a significant expansion of its jurisdiction as construed by other courts of appeal.

CONCLUSION

For the reasons set forth above, TIPLAA and NTOGA respectfully request this Court to grant petitioners' Petition for a Writ of Certiorari.

Respectfully submitted,

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Counsel for Amicus Curiae North
Texas Oil and Gas Association

*Counsel of Record

CERTIFICATE OF MAILING

I, Robert Emerson Vinson, certify that on this 29th day of October, 1982, placed in the United States mail at Washington, D.C. three true and correct copies of the above and foregoing Joint Combined Motion for Leave to File Amicus Curiae Brief Out of Time (and Amicus Curiae Brief in Support of the Petition for a Writ of Certiorari) of the Texas Independent Producers Legal Action Association and the North Texas Oil and Gas Association, with correct postage prepaid thereon, addressed to:

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